



# INDIAN CONTRACT

AND

## SPECIFIC RELIEF ACTS,

WITH A COMMENTARY, CRITICAL AND EXPLANATORY,

BY

THE RIGHT HONOURABLE

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## PREFACE TO THE SIXTH EDITION.

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THE production of this edition presumably the last to which I shall set my hand has been hampered by some peculiar difficulties. It has coincided with the repeal of the chapter on the Sale of Goods in the Contract Act to make way for a new Sale of Goods Act and this involved considerable alterations. Moreover the services of my learned friend Sir Dinshah Mulla who has now come to England as a member of the Judicial Committee of the Privy Council were required by the Legislative Department for framing both the Sale of Goods Act and the Partnership Act still under consideration. Hence I was deprived to a large extent of the co-operation which has aided so much to the value of the foregoing editions and I have had to work on the bulk of the Indian cases by myself and thus when it had been decided that for the convenience of practitioners the current serial reports as well as the authorised ones should be fully accounted for. Not all these reports are easy of access here but by good fortune and some friendly assistance the result is that references to the series entitled "Indian Cases" have been added to practically all cases cited from the year 1911 inclusive, and to many earlier ones and references to the series known as "A. I. R." have been given so far as practicable.

My views concerning the enormous quantity and the uncertain quality of Indian law reports have been in all respects confirmed by the closer personal examination thus imposed upon me. It should be common knowledge that it is useless to report off hand decisions which, with or without excuse take no notice of existing authorities—that in reporting considered judgments it should always be made clear by reporting the arguments if it does not otherwise appear what points were really contested and decided—that the head note of a case should be an intelligent summary and not a mere repetition of the facts followed by a sentence or two clipped from the judgment, and finally that in every professional report there is implied an undertaking that its correctness is warranted by a qualified advocate who was present in

court, and that it is not merely made up from the papers in the cause. The first three of these precepts are too often neglected; and I fear that the last, which is really a vital condition for the report being quotable in argument, is not invariably observed. If things continue in their present disastrous course the Indian reports will in a few years really be what a great poet in his haste called the English ones (even as they were a century ago), a wilderness. It is no answer to say that lawyers in the United States with fifty independent jurisdictions instead of half a dozen are in no better plight. In fact there exist in America certain mitigations which (for reasons too long to explain here) do not seem applicable in India.

Meanwhile one thing needful and practicable without any drastic measures is regular editorial supervision for at least the official reports. Provision is already made for this (how far acted upon I do not know) in some of the High Courts.

I have found to my regret that the weeding out of misprints was not quite complete in the last edition, in spite of the time allowed for final revision being rather short. I trust that it is practically complete now.

The revision of the index, and also the arduous task of adding and verifying the numerous additional references to Indian reports, have been performed by Mr E. Potton.

F. P.

LINCOLN'S INN,

February, 1931

## PREFACE TO THE FIRST EDITION.

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THE Indian Contract Act is in effect, and for the reasons explained in our commentary on the first section, a code of English law. Like all codes based on an existing authoritative doctrine, it assumes a certain knowledge of the principles and habits of thought which are embodied in that doctrine. But, unlike European codes it has to be applied in practice by magistrates and pleaders to whom the materials and surroundings of its own system are unfamiliar. It seems proper, therefore, that editors of an Anglo Indian Code should give a pretty full exposition of those fundamental notions in the Common Law which are concisely declared, with or without modification by the text. How far they have in fact been modified and whether by deliberate design or by accident in the execution, is a question of interpretation depending not on the text alone, but on its relations to the English authorities which the framers of the code had before them and to the subsequent development of English law. My first object has been to make those relations as clear as possible. For this purpose I have given more elementary explanation than would be required in a treatise addressed only to English lawyers or to practitioners in the High Courts, while I have endeavoured to avoid entering on details of procedure and other purely English technical matters beyond what was necessary for understanding the substance of the authorities.

We also have by this time a considerable number of reported Indian decisions on the Act. As it did not seem to me possible for an English lawyer who had not practised in India to deal adequately with these, I consented to undertake this edition only on the terms of the Indian cases being collected and digested by a competent person within the jurisdiction. Accordingly this task was entrusted to Mr D F Mulla, who has performed it, so far as I can judge, completely and faithfully. I do not profess to have verified all his references but I have verified and considered enough of them to be satisfied that his work is trustworthy. With the form of it I have interfered as little as might be,

though some rearrangement and recasting was needful in order to combine Mr Mulla's portion with my own in continuous whole. The result is that Mr Mulla while he is answerable for the inclusion of all Indian reported cases which ought to be cited for the use of practitioners is not necessarily answerable for the distribution of them as appropriate to this or that section or for the opinions expressed. At the same time I have seldom found occasion to differ with Mr Mulla. Much oftener I have been able to strengthen his conclusions by the analogy of recent English doctrine, and to state them with increased confidence.

The present commentary is critical as well as explanatory. The criticism unavoidably follows the Act section by section and is therefore broken up into many comments on details. In order to give a general notion beforehand of the causes which have made it necessary and the spirit, I trust no captious one, in which it was undertaken I now repeat the words I used in an unsigned review of Dr Whitley Stokes's "*Anglo Indian Codes*" on the publication of the first volume in 1887. Every written law which goes beyond mere regulation of details is a work of art, it can no more afford to dispense with unity of design and continuity of execution than a monumental building. It should proceed from one mind or from very few minds working in intimate association and it should be framed if not by one hand at least under uniform general direction and by hands trained in one school. Where these conditions cannot be satisfied in the first instance the next best thing is to secure a certain measure of uniformity by careful authoritative revision in the final stage. In England even this is seldom attainable. The Government of India is less hampered though not quite so free as might be supposed and it may be said to have made good progress in founding a school of legislative composition. The results obtained are on the whole worthy of the succession of distinguished men whose services in the Governor General's Council are commemorated by Mr Whitley Stokes and we must add that no small share of the labour and the credit belongs to Mr Stokes himself. Still there has been in some cases a want of continuity. Measures long held in suspense perhaps by excessive scruples have been finished and passed in something like haste. Not only the work of different hands but work done from quite different points of view has been pieced together with an incongruous effect. Another



# TABLE OF CONTENTS

## CHAPTER I

### OF THE COMMUNICATION ACCEPTANCE AND REVOCATION OF PROPOSALS

| SECTIONS  | PAGE |
|---|------|
| 3 <i>Communication: acceptance and revocation of proposals</i>          | 33   |
| What is communication ?   | 33   |
| Communication of special conditions                                     | 34   |
| Incorporation of prospectus in a policy of assurance                    | 35   |
| 4 <i>Communication when complete</i>                                    | 36   |
| Agreement between parties at a distance                                 | 37   |
| English rules   | 38   |
| Revocation arriving before acceptance                                   | 40   |
| 5 <i>Revocation of proposals and acceptances</i>                        | 40   |
| Revocation of offers  | 41   |
| Sale by auction   | 42   |
| Standing offers   | 43   |
| 6 <i>Revocation how made</i>  | 44   |
| Notice of revocation  | 45   |
| Revocation not presumed   | 46   |
| Lapse of time for acceptance  | 47   |
| Condition precedent to acceptance                                       | 48   |
| Death or insanity of proposer   | 48   |
| 7 <i>Acceptance must be absolute</i>                                    | 49   |
| Certainty of acceptance   | 49   |
| Apparent without real acceptance  | 51   |
| Manner of acceptance  | 54   |
| 8 <i>Acceptance by performing conditions or receiving consideration</i> | 55   |
| General offers  | 55   |
| Acting on offer—when sufficient acceptance                              | 57   |
| Acceptance by receiving consideration                                   | 61   |
| 9 <i>Promises express and implied</i>                                   | 62   |
| Express and tacit promises  | 62   |

## CHAPTER II

### OF CONTRACTS VOIDABLE CONTRACTS AND VOID AGREEMENTS

|   |    |
|---|----|
| 10 <i>What agreements are contracts</i>   | 64 |
| As to contracts required to be in writing | 64 |
| Oral and documentary evidence             | 64 |
| Variance between print and writing        | 65 |
| As to law relating to registration        | 65 |
| 11 <i>Who are competent to contract</i>   | 65 |
| Infancy                                   | 66 |
| Age of majority                           | 67 |
| Law to which he is subject                | 67 |
| Minors agreement                          | 68 |
| Fraudulent representation                 | 69 |
| Estoppel                                  | 71 |
| Mortgages and sales in favour of minors   | 73 |
| Ratification                              | 74 |



## SECTIONS

|  | PAGE |
|--|------|
| 19 <i>Voidability of agreements without free consent—continued</i>                   |      |
| Exception Means of discovering truth   | 129  |
| Explanation As to causing consent  | 131  |
| Rescission of voidable contracts   | 131  |
| Specific performance   | 132  |
| Right of third party cannot be set up  | 132  |
| 19A <i>Power to set aside contract induced by undue influence</i>                    | 132  |
| 20 <i>Agreement void where both parties are under a mistake as to matter of fact</i> | 134  |
| Scope of the section   | 135  |
| Mistake must be as to existing fact  | 135  |
| Specific performance   | 139  |
| Rectification  | 139  |
| Compensation   | 139  |
| 21 <i>Effect of mistakes as to law</i>   | 140  |
| 22 <i>Contract caused by mistake of one party as to matter of fact</i>               | 143  |
| 23 <i>What considerations and objects are lawful and what not</i>                    | 144  |
| Unlawful objects   | 145  |
| Acts forbidden by law  | 149  |
| Defeat the provisions of any law   | 154  |
| 1 Legislative enactments   | 155  |
| 2 Rules of Hindu and Mahomedan law   | 159  |
| 3 Other rules of law in force in British India                                       | 162  |
| Fraudulent object of contract  | 162  |
| Injury to the person or property of another  | 163  |
| Immoral object or consideration  | 164  |
| Opposed to public policy   | 167  |
| 1 Trading with enemy   | 167  |
| 2 Stifling prosecution   | 169  |
| 3 Champerty and maintenance  | 173  |
| 4 Interference with course of justice  | 179  |
| 5 Marriage brokerage contracts   | 180  |
| 6 Agreements tending to create interest against duty                                 | 183  |
| 7 Sale of public offices   | 184  |
| 8 Agreements tending to create monopolies  | 185  |
| 9 Agreement by client to remunerate his pleader a clerk                              | 185  |
| 10 Agreement not to bid  | 185  |
| Waiver of illegality   | 185  |
| Pleadings  | 185  |
| Other statutory provisions of similar effect—  |      |
| 1 Trusts Act   | 186  |
| 2 Transfer of Property Act IV of 1882  | 186  |
| 3 Indian Evidence Act I of 1872  | 186  |
| 4 Specific Relief Act I of 1877  | 186  |
| <i>Void Agreements</i>   |      |
| 24 <i>Agreements void if considerations and objects unlawful in part</i>             | 186  |
| Entire or divisible agreements   | 187  |
| Indian Trusts Act 1882   | 190  |

## SECTIONS

## PAGE

|    |  |     |
|----|--|-----|
| 25 | <i>Agreement without consideration void unless it is in writing and registered</i> | 190 |
|    | <i>Or is a promise to compensate for something done</i>                            | 190 |
|    | <i>Or is a promise to pay a debt barred by limitation law</i>                      | 190 |
|    | Consideration  | 191 |
|    | Forbearance and compromise as consideration  | 192 |
|    | Promise to perform existing duty   | 194 |
|    | Transfer of immovable property   | 197 |
|    | Negotiable instruments   | 197 |
|    | Registered writing   | 198 |
|    | Compensation for voluntary services  | 200 |
|    | Promise to pay a barred debt   | 202 |
|    | Agent generally or specially authorised in that behalf                             | 205 |
|    | Debt   | 205 |
| 26 | <i>Agreement in restraint of marriage void</i>                                     | 209 |
| 27 | <i>Agreement in restraint of trade void</i>  | 209 |
|    | <i>Saving of agreement not to carry on business of which goodwill is sold</i>      | 210 |
|    | <i>Of agreement between partners prior to dissolution</i>                          | 210 |
|    | <i>Or during continuance of partnership</i>  | 210 |
|    | Agreements in restraint of trade   | 210 |
|    | Restraint during term of service   | 212 |
|    | Public policy  | 213 |
|    | Agreements not in restraint of trade   | 215 |
|    | Trade combinations   | 216 |
|    | To that extent   | 218 |
|    | Lex loci contractus  | 219 |
| 28 | <i>Agreements in restraint of legal proceedings void</i>                           | 220 |
|    | <i>Saving of contract to refer to arbitration dispute that may arise</i>           | 220 |
|    | <i>Suits barred by such contracts [rep.]</i>                                       | 221 |
|    | <i>Saving of contract to refer questions that have already arisen</i>              | 221 |
|    | Agreement in restraint of legal proceedings  | 221 |
|    | Rights under or in respect of any contract   | 224 |
|    | Limitation of time to enforce rights under a contract                              | 224 |
|    | Ordinary tribunals   | 226 |
|    | Remedies for breach of agreement to refer  | 228 |
|    | Conventional restrictions of evidence  | 228 |
| 29 | <i>Agreements void for uncertainty</i>   | 228 |
|    | Ambiguous contracts  | 229 |
| 30 | <i>Agreements by way of wager void</i>   | 231 |
|    | <i>Exception in favour of certain prizes for horse racing</i>                      | 231 |
|    | <i>Section 291A of the Indian Penal Code not affected</i>                          | 231 |
|    | Wagering contracts   | 231 |
|    | What is a wager?   | 232 |
|    | By way of wager  | 233 |
|    | Teji Mandi transactions  | 239 |
|    | Agreements between Pakka Adatia and his constituents                               | 240 |
|    | Agreements collateral to wagering contracts  | 240 |
|    | Speculative transactions   | 244 |

| SECTIONS  | PAGE |
|---|------|
| 30 <i>Agreements by way of wager void—continued</i> |      |
| Oral evidence of agreement being by way of wager    | 246  |
| Wagering policies                                   | 249  |
| Promissory note for debt due on a wagering contract | 250  |
| Suit to recover deposit                             | 250  |
| Lotteries   | 251  |
| What is a lottery ?                                 | 251  |

## CHAPTER III

## OF CONTINGENT CONTRACTS

|   |     |
|---|-----|
| 31 <i>Contingent contract defined</i>   | 252 |
| Section in general  | 252 |
| Contingency dependent on act of party   | 254 |
| 32 <i>Enforcement of contracts contingent on an event happening</i>   | 256 |
| 33 <i>Enforcement of contracts contingent on an event not happening</i>   | 257 |
| 34 <i>When event on which contract is contingent to be deemed impossible if it is the future conduct of a living person</i> | 257 |
| 35 <i>When contracts become void which are contingent on happening of specified event within fixed time</i>                 | 258 |
| <i>When contracts may be enforced which are contingent on specified event not happening within fixed time</i>               | 258 |
| 36 <i>Agreements contingent on impossible events void</i>   | 259 |

## CHAPTER IV

## OF THE PERFORMANCE OF CONTRACTS

*Contracts which must be performed*

|  |     |
|--|-----|
| 37 <i>Obligations of parties to contracts</i>                  | 259 |
| Performance and discharge                                      | 260 |
| Succession to benefit of contract                              | 261 |
| Assignment of contracts  | 263 |
| Any other law  | 268 |
| 38 <i>Effect of refusal to accept offer of performance</i>     | 268 |
| Tender   | 269 |
| Offer must not be of part only                                 | 269 |
| Offer must be unconditional                                    | 271 |
| Able and willing   | 272 |
| Tender of instalments  | 273 |
| Reasonable opportunity   | 274 |
| Tender of money  | 276 |
| Legal tender   | 276 |
| Offer to one of several joint promisees                        | 277 |
| Validity of discharge by one of several joint promisees        | 277 |
| 39 <i>Effect of refusal of party to perform promise wholly</i> | 280 |
| Refusal to perform contract                                    | 280 |
| Disabled himself from performing                               | 285 |
| Promisee may put an end to the contract                        | 286 |
| Contract of service  | 283 |

## SECTIONS

## PAGE

39 *Effect of refusal of party to perform promise wholly—continued*

Measure of damages

290

Insolvency of promisor

291

*By whom Contracts must be performed*40 *Person by whom promise is to be performed*

291

Personal contracts

291

41 *Effect of accepting performance from third person*

293

42 *Devolution of joint liabilities*

293

43 *Any one of joint promisors may be compelled to perform*

294

*Each promisor may compel contribution*

294

*Sharing of loss by default in contribution*

294

Joint promisors

295

Effect of decree against some only of joint promisors

295

Suit against one of several partners

298

Co heirs

300

Co tenants

300

Contribution between joint promisors

300

When liability to contribute arises

300

Contribution as between judgment debtors

301

44 *Effect of release of one joint promisor*

302

45 *Devolution of joint rights*

302

Promise to two or more persons jointly

303

Right to performance of promises during joint lives

303

Validity of discharge by one of several joint promisees

305

Suit by surviving partner

305

Deceased partner's estate

306

Suit by representative of deceased partner

306

Right of performance of representative jointly with survivor

306

Survivorship in case of Government securities

307

*Time and Place for Performance*46 *Time for performance of promise where no application is to be made and no time specified*

307

Meaning of engagement

307

Reasonable time

307

47 *Time and place for performance of promise where time is specified and no application to be made*

308

Common Law rule

308

Delivery on Sunday

309

48 *Application for performance on certain day to be at proper time and place*

309

49 *Place for performance of promise where no application to be made and no place fixed for performance*

310

Rule of common Law

310

Place of delivery

311

Without application by the promisee

311

Place of performance in pakki adat contracts

311

## SECTIONS

PAGE

|    |  |     |
|----|--|-----|
| 50 | <i>Performance in manner or at time prescribed or sanctioned by promisee</i>   | 311 |
|    | Manner and time of performance   | 311 |
|    | <i>Performance of Reciprocal Promises</i>  |     |
| 51 | <i>Promisor not bound to perform unless reciprocal promisee ready and willing to perform</i>                               | 311 |
|    | Simultaneous performance   | 313 |
|    | Waiver of performance  | 315 |
|    | Readiness and willingness  | 315 |
|    | Averment of performance  | 317 |
| 52 | <i>Order of performance of reciprocal promises</i>   | 317 |
| 53 | <i>Invalidity of party preventing event on which contract is to take effect</i>  | 318 |
|    | Impossibility created by act of party  | 318 |
| 54 | <i>Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises</i> | 320 |
|    | Default of promisor in first performance   | 320 |
| 55 | <i>Effect of failure to perform at fixed time in contract in which time is essential</i>                                   | 322 |
|    | <i>Effect of such failure when time is not essential</i>   | 322 |
|    | <i>Effect of acceptance of performance at time other than that agreed upon</i>   | 322 |
|    | Time—when of essence of contract   | 323 |
|    | Contract voidable at option of promisee  | 326 |
| 56 | <i>Agreement to do impossible act</i>  | 326 |
|    | <i>Contract to do act afterwards becoming impossible or unlawful</i>   | 327 |
|    | <i>Compensation for loss through non performance of act known to be impossible or unlawful</i>                             | 327 |
|    | Impossibility in general   | 327 |
|    | Stoppage of work by strike   | 330 |
|    | Frustration of adventure—War conditions  | 330 |
|    | Frustration by Total or Partial Prohibition  | 331 |
|    | Becomes impossible   | 332 |
|    | Commercial impossibility   | 333 |
|    | Becomes unlawful   | 334 |
|    | Refund   | 334 |
|    | Dealings with enemies  | 335 |
| 57 | <i>Reciprocal promise to do things legal and also other things illegal</i>   | 340 |
|    | Scope of the section   | 340 |
| 58 | <i>Alternative promise one branch being illegal</i>  | 340 |
|    | <i>Appropriation of Payments</i>   |     |
| 59 | <i>Application of payment where debt to be discharged is indicated</i>   | 341 |
|    | Appropriation of payments  | 341 |
|    | Debt   | 341 |
|    | Several distinct debts   | 342 |
| 60 | <i>Application of payment where debt to be discharged is not indicated</i>   | 343 |
|    | Creditor's right to appropriate  | 343 |
|    | Principal and interest   | 345 |
|    | Compositions   | 345 |

| SECTIONS   | PAGE |
|--|------|
| 60 <i>Application of payment where debt to be discharged is not indicated—continued</i>                      |      |
| Debt barred by the law of limitation   | 346  |
| 61 <i>Application of payment where neither party appropriates</i>  | 346  |
| Scope of the Section   | 346  |
| <i>Contracts which need not be performed</i>   |      |
| 62 <i>Effect of novation, rescission, and alteration of contract</i>   | 347  |
| Novation   | 347  |
| Alteration of contract   | 351  |
| Settlement contracts   | 352  |
| Duties of restitution  | 352  |
| Transfer of actionable claims  | 353  |
| Promissory note on account of pre existing debt  | 353  |
| Unauthorised alteration of documents   | 353  |
| Indian decisions   | 355  |
| 63 <i>Promisee may dispense with or remit performance of promise</i>   | 360  |
| Rule of the common law   | 361  |
| Scope of the section   | 362  |
| Remission of performance   | 362  |
| Agreement to extend time   | 364  |
| 64 <i>Consequences of rescission of voidable contract</i>  | 365  |
| Scope of the section   | 365  |
| Minor's contract   | 366  |
| Election to rescind  | 367  |
| Benefit received thereunder  | 368  |
| 65 <i>Obligation of person who has received advantage under void agreement or contract that becomes void</i> | 368  |
| Duties of restitution  | 369  |
| Scope of the section   | 370  |
| Where an agreement is discovered to be void  | 371  |
| Where a contract becomes void  | 372  |
| Contracts with corporations  | 375  |
| Limitation   | 378  |
| Receiving advantage  | 379  |
| 66 <i>Mode of communicating or revoking rescission of voidable contract</i>                                  | 380  |
| 67 <i>Effect of neglect of promisee to afford promisor reasonable facilities for performance</i>             | 380  |
| Refusal or neglect of promisee   | 380  |

## CHAPTER V

## OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

|   |     |
|---|-----|
| 68 <i>Claim for necessities supplied to person incapable of contracting or on his account</i> | 391 |
| Minors  | 391 |
| 'Necessaries'   | 392 |

## SECTIONS

## PAGE

|    |  |     |
|----|--|-----|
| 69 | <i>Reimbursement of person paying money due by another, in payment of which he is interested</i> | 382 |
|    | English law  | 383 |
|    | Person interested in the payment of money  | 385 |
|    | Suit for contribution  | 389 |
|    | Money which another is bound by law to pay   | 390 |
|    | Bound by law   | 391 |
|    | Purchase of property subject to payment of incumbrances  | 392 |
|    | Payment must be to another person  | 392 |
|    | Remedies against wrong doer  | 393 |
|    | Other remedies   | 393 |
| 70 | <i>Obligation of person enjoying benefit of non gratuitous act</i>                               | 393 |
|    | Non gratuitous act done for another  | 393 |
|    | Contribution   | 395 |
|    | Remedies against wrong doer  | 400 |
| 71 | <i>Responsibility of finder of goods</i>   | 400 |
|    | Liability of finder  | 400 |
| 72 | <i>Liability of person to whom money is paid or thing delivered by mistake or under coercion</i> | 401 |
|    | Payment under mistake of fact or mistake of law  | 401 |
|    | Coercion   | 403 |
|    | Wrongful payment   | 404 |

## CHAPTER VI

## OF THE CONSEQUENCES OF BREACH OF CONTRACT

|    |  |     |
|----|--|-----|
| 73 | <i>Compensation for loss or damage caused by breach of contract</i>                          | 405 |
|    | <i>Compensation for failure to discharge obligation resembling those created by contract</i> | 405 |
|    | Market rate  | 406 |
|    | Market rate limits of rule   | 408 |
|    | Where no time fixed for delivery   | 410 |
|    | Late delivery  | 410 |
|    | Delivery by instalments—Anticipatory breach  | 411 |
|    | Notice of special circumstances  | 412 |
|    | Notice of contract of resale   | 413 |
|    | Notice of special circumstances  | 415 |
|    | Warranty   | 415 |
|    | Delay in payment of money  | 416 |
|    | Loss of profits on breach of contract  | 417 |
|    | No notice of special circumstances   | 418 |
|    | Remedy provided by section not the only remedy for breach of contract                        | 418 |
|    | Rule in <i>Hadley v Barendale</i>  | 418 |
|    | Contracts relating to immovable property   | 426 |
|    | Interest by way of damages   | 429 |
|    | Breach of promise of marriage  | 432 |
|    | Section applies only where contract broken   | 432 |

| SECTIONS  | PAGES |
|---|-------|
| 74 <i>Compensation for breach of contract where penalty stipulated for</i>                      | 432   |
| Penalty and liquidated damages  | 434   |
| Amendment   | 435   |
| Stipulations for interest   | 436   |
| I Stipulations for enhanced rate of interest  | 437   |
| Effect of Act VI of 1899  | 440   |
| II Stipulations for compound interest   | 444   |
| III Stipulations for payment of interest if principal not paid on due date                      | 447   |
| IV Stipulations for payment of interest at a lower rate if interest paid regularly on due dates | 452   |
| V Stipulations for payment of interest from date of bond the rate of interest being exorbitant  | 452   |
| Deposit on agreement for purchase   | 454   |
| Forfeiture of salary  | 454   |
| Reasonable compensation   | 455   |
| 75 <i>Party rightfully rescinding contract entitled to compensation</i>                         | 460   |

## CHAPTER VII

## SALE OF GOODS

(Repealed by the Indian Sale of Goods Act 1930 s 65 see the note on p 461)

## CHAPTER VIII

## OF INDEMNITY AND GUARANTEE

|   |     |
|---|-----|
| 124 <i>Contract of indemnity defined</i>                              | 462 |
| Indemnity   | 462 |
| Commencement and extent of indemnifier's liability                    | 463 |
| 125 <i>Rights of indemnity holder when sued</i>                       | 465 |
| Rights of promisor  | 466 |
| 126 <i>Contract of guarantee surety principal debtor and creditor</i> | 467 |
| Liability meaning of  | 468 |
| 127 <i>Consideration for guarantee</i>                                | 468 |
| Consideration for a contract of guarantee                             | 468 |
| 128 <i>Surety's liability</i>   | 469 |
| Proof of surety's liability   | 470 |
| Liability for whole or part of debt                                   | 470 |
| Surety's liability where original contract is void or voidable        | 472 |
| Administration and surety bonds                                       | 472 |
| Limitation  | 472 |
| 129 <i>Continuing guarantee</i>                                       | 473 |
| Continuing guarantee  | 473 |
| 130 <i>Revocation of continuing guarantee</i>                         | 474 |
| Future transactions   | 475 |
| Notice  | 476 |
| Sureties for guardians and administrators                             | 476 |
| 131 <i>Revocation of continuing guarantee by surety's death</i>       | 477 |
| What is a contract to the contrary                                    | 477 |

| SECTIONS   | PAGE |
|--|------|
| 132 <i>Liability of two persons primarily liable not affected by arrangements between them that one shall be surety on another's default</i> | 478  |
| Joint debtors and suretyship   | 478  |
| 133 <i>Discharge of surety by variance in terms of contract</i>  | 480  |
| Variation of contract between creditor and principal   | 480  |
| 134 <i>Discharge of surety by release or discharge of principal debtor</i>   | 485  |
| Creditor's discharge of principal debtor   | 486  |
| Discharge by operation of law  | 487  |
| Act or omission of the creditor  | 487  |
| Creditor's omission to sue principal within limitation period  | 488  |
| 135 <i>Discharge of surety when creditor compounds with debtor or agrees not to sue principal debtor</i>                                     | 489  |
| Contract to give time to principal debtor  | 489  |
| Composition  | 491  |
| Contrary agreement   | 491  |
| 136 <i>Surety not discharged when agreement made with third person to give time to principal debtor</i>                                      | 491  |
| 137 <i>Creditor's forbearance to sue does not discharge surety</i>   | 492  |
| Mere forbearance   | 492  |
| 138 <i>Release of one co surety does not discharge others</i>  | 493  |
| Release of one of several sureties   | 493  |
| 139 <i>Discharge of surety by creditor's act or omission impairing surety's eventual remedy</i>  | 494  |
| Act or omission of creditor tending to impair surety's remedy  | 494  |
| Act or omission impairing surety's eventual remedy   | 495  |
| 140 <i>Rights of surety on payment or performance</i>  | 496  |
| 141 <i>Surety's right to benefit of creditor's securities</i>  | 498  |
| Surety's right to benefit of securities  | 499  |
| To the extent of the value of the security   | 500  |
| When surety becomes entitled to benefit of creditor's securities   | 501  |
| 142 <i>Guarantee obtained by misrepresentation invalid</i>   | 501  |
| 143 <i>Guarantee obtained by concealment invalid</i>   | 502  |
| Guarantee obtained by misrepresentation or concealment   | 502  |
| What is a material circumstance  | 504  |
| 144 <i>Guarantee on contract that creditor shall not act on it until co surety joins</i>   | 505  |
| 145 <i>Implied promise to indemnify surety</i>   | 505  |
| Surety's right to indemnity  | 506  |
| Whatever sum he has rightfully paid  | 507  |
| Guarantee without concurrence of principal debtors   | 507  |
| 146 <i>Co sureties liable to contribute equally</i>  | 507  |
| Contribution by co sureties  | 508  |
| 147 <i>Liability of co sureties bound in different sums</i>  | 509  |

#### CHAPTER IX OF BAILMENT

|   |     |
|---|-----|
| 148 <i>Bailment, bailor, and bailee defined</i> | 510 |
| Nature of transaction                           | 511 |
| No bailment where whole property transferred    | 512 |

| SECTIONS  | PAGE |
|---|------|
| 149 <i>Delivery to bailee how made</i>  | 513  |
| 150 <i>Bailor's duty to disclose faults in goods bailed</i>   | 514  |
| 151 <i>Care to be taken by bailee</i>   | 516  |
| Common carriers   | 517  |
| Carriers by sea or hire   | 518  |
| Carriers by railway   | 519  |
| Innkeeper   | 520  |
| Burden of proof   | 521  |
| Contract by bailee exempting himself from liability for negligence  | 524  |
| Bailee's liability for negligence of servants   | 524  |
| 152 <i>Bailee when not liable for loss, etc. of thing bailed</i>  | 524  |
| Care to be taken by bailee  | 525  |
| 153 <i>Termination of bailment by bailee's act inconsistent with conditions</i>   | 525  |
| 154 <i>Liability of bailee making unauthorised use of goods bailed</i>  | 526  |
| 155 <i>Effect of mixture with bailor's consent of his goods with bailee's</i>   | 527  |
| 156 <i>Effect of mixture, without bailor's consent when the goods can be separated</i>  | 528  |
| 157 <i>Effect of mixture without bailor's consent when the goods cannot be separated</i>  | 528  |
| 158 <i>Repayment by bailor of necessary expenses</i>  | 529  |
| 159 <i>Restoration of goods lent gratuitously</i>   | 529  |
| 160 <i>Return of goods bailed, on expiration of time or accomplishment of purpose</i>   | 530  |
| 161 <i>Bailee's responsibility when goods are not duly returned</i>   | 531  |
| 162 <i>Termination of gratuitous bailment by death</i>  | 531  |
| 163 <i>Bailor entitled to increase or profit from goods bailed</i>  | 532  |
| 164 <i>Bailor's responsibility to bailee</i>  | 532  |
| 165 <i>Bailment by several joint owners</i>   | 532  |
| 166 <i>Bailee not responsible on redelivery to bailor without title</i>   | 533  |
| Return of goods to or to the order of the bailor  | 533  |
| Estoppel of bailee  | 533  |
| 167 <i>Right of third person claiming goods bailed</i>  | 534  |
| 168 <i>Right of finder of goods may sue for specific reward offered</i>   | 535  |
| 169 <i>When finder of thing commonly on sale may sell it</i>  | 535  |
| 170 <i>Bailee's particular lien</i>   | 536  |
| Principle of bailee's lien  | 536  |
| Contract to the contrary  | 537  |
| 171 <i>General lien of bankers, factors, wharfingers, attorneys and policy brokers</i>  | 537  |
| General as distinct from particular lien  | 538  |
| Bankers   | 539  |
| Factor  | 539  |
| Wharfingers   | 541  |
| Attorneys   | 541  |
| Kinds of lien dealt with in this Act  | 542  |
| <i>Bailment of pledges</i>  |      |
| 172 <i>Pledge, pawn and pawnee defined</i>  | 543  |
| 173 <i>Pawnee's right of retention</i>  | 544  |
| 174 <i>Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances</i> | 545  |
| 175 <i>Pawnee's right as to extraordinary expenses incurred</i>   | 545  |

| CTIONS  | PAGE |
|---|------|
| 176 <i>Pawnee's right where pawnor makes default</i>                      | 545  |
| Pawnee's rights   | 546  |
| Sale of thing pledged   | 546  |
| Reasonable notice of sale   | 547  |
| Limitation  | 547  |
| 177 <i>Defaulting pawnor's right to redeem</i>                            | 547  |
| Limitation  | 548  |
| 178 <i>Pledge by mercantile agent</i>                                     | 548  |
| Original s 178  | 549  |
| Indian Factors Acts   | 549  |
| Pledge by mercantile agent  | 549  |
| Antecedent debt   | 551  |
| Good faith  | 551  |
| Notice  | 551  |
| Pledge by co owner in possession  | 552  |
| Seller or buyer in possession after sale                                  | 552  |
| <i>Pledge by seller remaining in possession</i>                           | 552  |
| <i>Pledge by buyer obtaining possession</i>                               | 553  |
| Competition between prior mortgagee and subsequent pledgee                | 553  |
| Documents of title to goods   | 553  |
| Revocation of authority of mercantile agent                               | 554  |
| 178A <i>Pledge by person in possession under voidable contract</i>        | 554  |
| Good faith  | 555  |
| Notice  | 555  |
| 179 <i>Pledge where pawnor has only a limited interest</i>                | 555  |
| <i>Suits by Bailees or Bailors against Wrong doers</i>                    |      |
| 180 <i>Suits by bailor or bailee against wrong doer</i>                   | 556  |
| 181 <i>Apportionment of relief of compensation obtained by such suits</i> | 557  |

## CHAPTER X

### AGENCY

#### *Appointment and Authority of Agents*

|   |     |
|---|-----|
| 182 'Agent' and principal defined                 | 557 |
| Nature of agency in general                       | 557 |
| Del credere agent                                 | 558 |
| Co agents   | 559 |
| 183 Who may employ agent                          | 559 |
| 184 Who may be an agent                           | 559 |
| 185 Consideration not necessary                   | 560 |
| 186 Agent's authority may be expressed or implied | 560 |
| Express authority                                 | 560 |
| 187 Definitions of express and implied authority  | 560 |
| Implied authority                                 | 561 |
| Husband and wife                                  | 561 |
| 188 Extent of agent's authority                   | 563 |
| Extent of authority                               | 564 |
| Construction of powers of attorney                | 565 |

## SECTIONS

## PAGE

|     |   |     |
|-----|---|-----|
| 188 | <i>Extent of agent's authority—continued</i>  |     |
|     | Authority to do every lawful thing necessary for the purpose                                      | 567 |
|     | Authority of counsel, attorney and pleader  | 567 |
|     | Authority of factor   | 568 |
|     | Authority of broker   | 569 |
|     | Authority of auctioneer   | 570 |
|     | Authority of shipmaster   | 570 |
| 189 | <i>Agent's authority in an emergency</i>  | 573 |
|     | <i>Sub agents</i>   |     |
| 190 | <i>When agent cannot delegate</i>   | 574 |
| 191 | <i>Sub-agent ' defined</i>  | 575 |
| 192 | <i>Representation of principal by sub-agent properly appointed</i>                                | 576 |
|     | <i>Agent's responsibility for sub-agent</i>   | 576 |
|     | <i>Sub-agent's responsibility</i>   | 576 |
|     | <i>Principal and sub agent</i>  | 576 |
|     | <i>Agent's responsibility for sub agent</i>   | 577 |
| 193 | <i>Agent's responsibility for sub-agent appointed without authority</i>                           | 577 |
| 194 | <i>Relation between principal and person duly appointed by agent to act in business of agency</i> | 578 |
| 195 | <i>Agent's duty in naming such person</i>   | 579 |
|     | <i>Ratification</i>   |     |
| 196 | <i>Right of person as to acts done for him without his authority</i>                              | 580 |
|     | <i>Effect of ratification</i>   |     |
|     | Conditions of Ratification on behalf of another   | 580 |
|     | Acts done without knowledge or authority  | 582 |
|     | Retrospective effect  | 582 |
|     | What acts cannot be ratified  | 583 |
|     | Agents of Government  | 584 |
| 197 | <i>Ratification may be expressed or implied</i>   | 584 |
|     | Express ratification  | 584 |
|     | Implied ratification  | 584 |
| 198 | <i>Knowledge requisite for valid ratification</i>   | 584 |
| 199 | <i>Effect of ratifying unauthorised act forming part of a transaction</i>                         | 585 |
| 200 | <i>Ratification of unauthorised act cannot injure third person</i>                                | 586 |
|     | <i>Revocation of Authority</i>  |     |
| 201 | <i>Termination of agency</i>  | 587 |
|     | Completion of business of agency  | 587 |
|     | Death of principal  | 588 |
|     | Where the agency is for a fixed term  | 588 |
|     | Payment or act by attorney under power  | 588 |
| 202 | <i>Termination of agency where agent has an interest in subject matter</i>                        | 588 |
|     | Authority coupled with interest   | 589 |
|     | Indian authorities  | 591 |
|     | Factors for sale of goods   | 591 |
| 203 | <i>When principal may revoke agent's authority</i>  | 592 |
|     | What amounts to exercise of authority   | 592 |

| SECTIONS  | PAGE |
|---|------|
| 204 <i>Relocation where authority has been partly exercised</i>   | 592  |
| Authority partly exercised  | 593  |
| 205 <i>Compensation for relocation by principal or renunciation by agent</i>  | 593  |
| Compensation for revocation   | 594  |
| 206 <i>Notice of revocation or renunciation</i>   | 594  |
| 207 <i>Relocation and renunciation may be expressed or implied</i>  | 595  |
| 208 <i>When termination of agent's authority takes effect as to agent, and as to third persons</i>                  | 595  |
| Time from which revocation operates   | 595  |
| 209 <i>Agent's duty on termination of agency by principal's death or insanity</i>                                   | 596  |
| 210 <i>Termination of sub agent's authority</i>   | 597  |
| <i>Agent's Duty to Principal</i>  |      |
| 211 <i>Agent's duty in conducting principal's business</i>  | 597  |
| Departure from instructions   | 598  |
| If any loss be sustained  | 598  |
| Custom of trade   | 599  |
| Usage of Bombay market   pakki adat system  | 599  |
| Usage of kacchi adat system in cotton business  | 601  |
| Bombay Silver Market  | 601  |
| 212 <i>Skill and diligence required from agent</i>  | 602  |
| Gratuitous agent  | 603  |
| 213 <i>Agent's accounts</i>   | 604  |
| Agent's duty to account   | 604  |
| Liability of representative of agent to account   | 605  |
| 214 <i>Agent's duty to communicate with principal</i>   | 606  |
| 215 <i>Right of principal when agent deals on his own account in business of agency without principal's consent</i> | 606  |
| 216 <i>Principal's right to benefit gained by agent dealing on his own account in business of agency</i>            | 608  |
| Principal's rights to profits   | 608  |
| Forfeiture of commission  | 609  |
| Knowledge of principal  | 609  |
| Profit not required in course of agency   | 610  |
| Unauthorised profits of agent   | 610  |
| Payments authorised by custom   | 611  |
| Agreements against agent's duty void  | 611  |
| 217 <i>Agent's right of retainer out of sums received on principal's account</i>                                    | 613  |
| Pakki adat  | 614  |
| Meaning of   business   | 614  |
| 218 <i>Agent's duty to pay sums received for principal</i>  | 614  |
| Mode of payment   | 614  |
| Payment in respect of illegal transaction   | 614  |
| 219 <i>When agent's remuneration becomes due</i>  | 615  |
| What is a   special contract  | 615  |
| Agent prevented from earning remuneration   | 617  |
| Express contract for remuneration   | 617  |

| SECTIONS   | PAGE |
|--|------|
| 220 <i>Agent not entitled to remuneration for business misconducted</i>  | 618  |
| 221 <i>Agent's lien on principal's property</i>  | 618  |
| Agent's lien   | 619  |
| How far lien effective against third person  | 620  |
| Lien of sub agents   | 620  |
| How lien lost or extinguished  | 621  |
| <i>Principal's Duty to Agent</i>   |      |
| 222 <i>Agent to be indemnified against consequences of lawful acts</i>   | 623  |
| Limits of agent's indemnity  | 623  |
| Costs of defending action  | 624  |
| C I F contract with commission agent   | 625  |
| 223 <i>Agent to be indemnified against consequences of acts done in good faith</i>   | 625  |
| Unlawful acts  | 626  |
| 224 <i>Non liability of employer of agent to do a criminal act</i>   | 626  |
| 225 <i>Compensation to agent for injury caused by principal's neglect</i>  | 627  |
| <i>Effect of Agency on Contracts with Third Persons</i>  |      |
| 226 <i>Enforcement and consequences of agent's contracts</i>   | 628  |
| 227 <i>Principal how far bound when agent exceeds authority</i>  | 629  |
| 228 <i>Principal not bound when excess of agent's authority is not separable</i>   | 630  |
| 229 <i>Consequences of notice given to agent</i>   | 631  |
| 230 <i>Agent cannot personally enforce nor be bound by contracts on behalf of principal</i>                                    | 634  |
| <i>Presumption of contract to the contrary</i>   | 634  |
| Principle of the rule and exceptions   | 635  |
| Contract to the contrary   | 635  |
| Agency coupled with interest   | 638  |
| Right of agent to sue for money paid by mistake  | 639  |
| Presumed exceptions   Foreign principal  | 639  |
| Principal undisclosed  | 640  |
| Principal not liable   | 643  |
| Deed executed in agent's name  | 643  |
| Sovereign States as principals   | 644  |
| Negotiable instruments   | 644  |
| Defendant's rights where agent sues in own name  | 645  |
| Effect of settlement with principal  | 646  |
| 231 <i>Rights of parties to a contract made by agent not disclosed</i>   | 646  |
| 232 <i>Performance of contract with agent supposed to be principal</i>   | 646  |
| Rights of undisclosed principal  | 647  |
| Equities between agent and third party   | 648  |
| 233 <i>Right of person dealing with agent personally liable</i>  | 650  |
| Cases where agent is personally liable   | 650  |
| Creditor's election  | 650  |
| 234 <i>Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable</i> | 651  |
| 235 <i>Liability of pretended agent</i>  | 652  |
| Implied warranty of authority  | 652  |

| SECTIONS   | PAGE |
|--|------|
| 235 <i>Liability of pretended agent—continued</i>  |      |
| Representation must be effective   | 653  |
| Measure of damages   | 653  |
| Limitation   | 654  |
| 236 <i>Person falsely contracting as agent not entitled to performance</i>                       | 654  |
| 237 <i>Liability of principal inducing belief that agent's unauthorised acts were authorised</i> | 655  |
| Ostensible authority   | 656  |
| Notice of excess of authority  | 658  |
| 238 <i>Effect on agreement of misrepresentation or fraud by agent</i>                            | 659  |
| Course of employment   | 659  |
| Admission by agent   | 662  |
| Privilege from distress of goods in hands of agent   | 664  |
| Bribery of agent   | 664  |
| Right of principal to follow property into hands of third person                                 | 665  |
| Personal liability of agent to repay money received to principal's use                           | 666  |

## CHAPTER VI

## OF PARTNERSHIP

|   |     |
|---|-----|
| 239 <i>Partnership defined</i>  | 668 |
| Definition and essentials of partnership  | 668 |
| Co ownership and partnership  | 670 |
| Profits   | 672 |
| Sharing profits   | 672 |
| Partnership and service   | 674 |
| The firm  | 675 |
| Joint Hindu family firm   | 678 |
| 240 <i>Lender not a partner by advancing money for share of profits</i>                       | 679 |
| 241 <i>Property left in business by retiring partner or deceased partner's representative</i> | 680 |
| 242 <i>Servant or agent remunerated by share of profits not a partner</i>                     | 681 |
| 243 <i>Widow or child of deceased partner receiving annuity out of profits not a partner</i>  | 681 |
| 244 <i>Person receiving portion of profits for sale of goodwill not a partner</i>             | 682 |
| 245 <i>Responsibility of person leading another to believe him a partner</i>                  | 682 |
| Holding out   | 682 |
| Proof of holding out  | 683 |
| 246 <i>Liability of person permitting himself to be represented as a partner</i>              | 684 |
| Holding out by acquiescence   | 684 |
| Not applicable to torts   | 686 |
| Estoppel distinct in kind from actual authority   | 686 |
| 247 <i>Minor partner not personally liable but his share is</i>                               | 686 |
| Difference from English law as to minor partners  | 686 |
| Hindu minor's ancestral trade   | 688 |
| 248 <i>Liability of minor partner on attaining majority</i>                                   | 688 |
| 249 <i>Partner's liability for debts of partnership</i>                                       | 689 |
| Nature of partnership liabilities   | 689 |

| SECTIONS  | PAGE |
|---|------|
| 250 <i>Partner's liability to third person for neglect or fraud of co partner</i>   | 690  |
| Ground of liability    usage of firm, how material  | 691  |
| 251 <i>Partner's power to bind co partners</i>  | 693  |
| Question as to necessity  | 694  |
| General presumptions of authority in partnership affairs  | 694  |
| Admissions by partners  | 696  |
| Notice to partner   | 697  |
| Authority in particular transactions  | 697  |
| Acknowledgment of debt by partner   | 697  |
| Arbitration   | 698  |
| Bills of Exchange   | 698  |
| Lease or mortgage   | 698  |
| Exception    restriction of authority   | 699  |
| 252 <i>Annulment of contract defining partner's rights and obligations</i>  | 701  |
| Variations by consent   | 701  |
| 253 <i>Rules determining partner's mutual relations where no contract to contrary</i>                                     | 701  |
| Sub s (1) Partnership property  | 703  |
| Goodwill  | 703  |
| Assets    benefit of contracts  | 704  |
| Partner's share   | 704  |
| Sub s (2) Share in profits and losses   | 705  |
| Partner's right to indemnity and contribution   | 706  |
| (3) (4) Right and duty of partners to attend to business  | 707  |
| (5) Power of majority   | 707  |
| (6) New partners    assignment of share   | 707  |
| (7) Dissolution of firm   | 708  |
| (8) Partnership at will    tacit dissolution  | 709  |
| (9) Expulsion   | 709  |
| (10) Dissolution by death   | 709  |
| Custody of books  | 710  |
| 254 <i>When Court may dissolve partnership</i>  | 710  |
| Sub s (3) Transfer of partner's share by operation of law   | 711  |
| (5) Gross misconduct  | 711  |
| (6) Business carried on at a loss   | 711  |
| Rescission for fraud  | 712  |
| 255 <i>Dissolution of partnership by prohibition of business</i>  | 712  |
| 256 <i>Rights and obligations of partners in partnership continued after expiry of term for which it was entered into</i> | 713  |
| 257 <i>General duties of partners</i>   | 714  |
| 258 <i>Account to firm of benefit derived from transaction affecting partnership</i>                                      | 714  |
| 259 <i>Obligations to firm of partner carrying on competing business</i>  | 715  |
| 260 <i>Revocation of continuing guarantee by change in firm</i>   | 716  |
| 261 <i>Non liability of deceased partner's estate for subsequent obligations</i>  | 717  |
| 262 <i>Payment of partnership debts and of separate debts</i>   | 717  |
| 263 <i>Continuance of partners' rights and obligations after dissolution</i>  | 719  |
| Suit by surviving partner for debts to firm   | 720  |
| Use of partnership name   | 720  |
| Duties between continuing and outgoing partners   | 721  |

| SECTIONS   | PAGE |
|--|------|
| 264 Notice of dissolution  | 722  |
| What notice required   | 729  |
| Persons dealing with a firm  | 723  |
| Dormant partner  | 723  |
| 265 Winding up by Court on dissolution or after termination                            | 724  |
| Amendment  | 724  |
| Partner's right to accounts  | 724  |
| Old section  | 724  |
| Suit for account   | 725  |
| Appointment of receiver  | 726  |
| Receivers in Indian practice   | 728  |
| Limitation period for a suit for dissolution   | 729  |
| Assets brought in after dissolution  | 729  |
| Cost in a suit for dissolution   | 729  |
| Interest   | 729  |
| Form of plaint in a suit for dissolution   | 730  |
| 266 Limited liability partnerships incorporated partnerships and joint stock companies | 730  |
| Schedule Enactments repealed   | 731  |

## THE SPECIFIC RELIEF ACT, 1877.

|              |     |
|--------------|-----|
| INTRODUCTORY | 737 |
| PREAMBLE     | 740 |

### PART I

#### PRELIMINARY

| SECTIONS                                  |     |
|---|-----|
| 1 Short title                             | 740 |
| Local extent                              | 741 |
| Commencement                              | 741 |
| 2 [ <i>Repealed</i> ]                     | 741 |
| 3 Interpretation clause                   | 741 |
| Words defined in Contract Act             | 742 |
| What is obligation                        | 742 |
| Express implied or constructive trust     | 743 |
| 4 Savings                                 | 744 |
| 5 Specific relief how given               | 745 |
| 6 Preventive relief                       | 745 |
| 7 Relief not granted to enforce penal law | 746 |
| What is enforcing penal law               | 746 |

PART II  
OF SPECIFIC RELIEF

CHAPTER I

OF RECOVERING POSSESSION OF PROPERTY

(a) *Possession of Immoveable Property*

| SECTIONS   | PAGE |
|--|------|
| 8 Recovery of specific immoveable property                   | 746  |
| In the manner prescribed by the Code of Civil Procedure      | 746  |
| 9 Suit by person dispossessed of immoveable property         | 747  |
| Restitution of dispossessed holder                           | 747  |
| Possession Title and Evidence                                | 748  |
| Limitation   | 749  |
| Object of the Section  | 749  |
| Scope of the Section   | 749  |
| Failure to prove title in suit for possession based on title | 750  |
| Who may sue under the Section                                | 751  |
| Who may be sued under the Section                            | 751  |
| Person dispossessed  | 751  |
| Immoveable property  | 751  |
| Otherwise than in due course of law                          | 752  |
| Order under Criminal Procedure Code s 145                    | 753  |
| Limits of decree under this section                          | 753  |
| Suit brought more than six months after dispossession        | 753  |
| Non occupancy Raiyat   | 754  |
| Appeal   | 755  |

(b) *Possession of Moveable Property*

|   |     |
|---|-----|
| 10 Recovery of specific moveable property   | 755 |
| 11 Liability of person in possession not as owner to deliver to person entitled to immediate possession | 756 |
| Restitution of chattels   | 757 |
| Possession  | 757 |
| Execution   | 757 |

CHAPTER II

OF THE SPECIFIC PERFORMANCE OF CONTRACTS

|  |     |
|--|-----|
| Introduction to Chapter II                 | 757 |
| Presumption as to contracts to convey land | 758 |
| Treatment of subject in English books      | 759 |
| Treatment in British Indian law            | 759 |

(a) *Contracts which may be specifically enforced*

|  |     |
|--|-----|
| 12 Cases in which specific performance enforceable | 760 |
| Immovable property                                 | 761 |
| Moveable goods                                     | 762 |
| Other kinds of property                            | 763 |

## CHAPTER III

## OF THE RECTIFICATION OF INSTRUMENTS

| SECTIONS                                       | PAGE |
|--|------|
| Rectification Introductory                     | 824  |
| 31 When instrument may be rectified            | 826  |
| Rectification                                  | 827  |
| Mutual mistake                                 | 827  |
| Counterclaim for rectification                 | 828  |
| Rights acquired by third persons in good faith | 829  |
| 32 Presumption as to intent of parties         | 829  |
| 33 Principles of rectification                 | 829  |
| 34 Specific enforcement of rectified contract  | 829  |

## CHAPTER IV

## OF THE RESCISSION OF CONTRACTS

|   |     |
|---|-----|
| Judicial rescission Introductory                                      | 830 |
| 35 When rescission may be adjudged                                    | 831 |
| Rescission  | 832 |
| Any person interested in contract                                     | 832 |
| Voidable contract   | 832 |
| In pari delicto   | 832 |
| Lapse of time and limitation  | 833 |
| 36 Rescission for mistake   | 833 |
| 37 Alternative prayer for rescission in suit for specific performance | 833 |
| 38 Court may require party rescinding to do equity                    | 833 |

## CHAPTER V

## OF THE CANCELLATION OF INSTRUMENTS

|   |     |
|---|-----|
| 39 When cancellation may be ordered   | 834 |
| When cancellation may be ordered  | 835 |
| Any person against whom an instrument is void or voidable                       | 835 |
| Reasonable apprehension of serious injury                                       | 835 |
| Registration  | 837 |
| Limitation  | 837 |
| 40 What instruments may be partially cancelled                                  | 838 |
| Partial cancellation  | 838 |
| 41 Power to require party for whom instrument is cancelled to make compensation | 839 |
| Compensation  | 839 |
| Compensation on Cancellation  | 839 |
| Minors  | 839 |

## CHAPTER VI

## OF DECLARATORY DECREES

|   |     |
|---|-----|
| 42 Discretion of Court as to declaration of status or right | 840 |
| Bar to such declaration                                     | 840 |
| Origin and purpose of the section                           | 841 |

| SECTIONS  | PAGE |
|---|------|
| 42 Discretion of Court as to declaration of status or right— <i>continued</i> |      |
| Bar to such declaration— <i>continued</i>                                     |      |
| Scope of the section  | 813  |
| Whether a decree merely declaratory can be made independently of the section  | 814  |
| Discretion of the Court   | 817  |
| A suit does not merely lie to set aside an assertion                          | 818  |
| Person entitled to any legal character or to any right as to any property     | 819  |
| Declaration as to right to possession   | 851  |
| Interested to deny  | 852  |
| Further relief  | 852  |
| Where no right to further relief shown  | 857  |
| Reversionary heir   | 857  |
| Vested interest   | 858  |
| Contingent interest   | 858  |
| 43 Effect of declaration  | 859  |

## CHAPTER VII

## OF THE APPOINTMENT OF RECEIVERS

|   |     |
|---|-----|
| 44 Appointment of Receivers discretionary | 859 |
| Reference to Code of Civil Procedure      | 859 |

## CHAPTER VIII

## OF THE ENFORCEMENT OF PUBLIC DUTIES

|  |     |
|--|-----|
| 45 Power to order public servants and others to do certain specific acts | 859 |
| Exemptions from such power   | 860 |
| Mandamus   | 860 |
| Scope of the chapter   | 861 |
| High Courts  | 862 |
| Conditions to be satisfied before making an order under section 45       | 862 |
| Requiring a specific act to be done or forborne                          | 862 |
| Person holding a public office   | 863 |
| Corporation  | 863 |
| In his or its public character   | 863 |
| Inferior Court of Judicature   | 864 |
| Personal right   | 864 |
| Clearly incumbent under any law for the time being in force              | 865 |
| Other specific and adequate legal remedy                                 | 865 |
| 46 Application how made  | 866 |
| Procedure thereon  | 866 |
| Order in alternative   | 866 |
| 47 Peremptory order  | 866 |
| 48 Execution of and appeal from orders                                   | 866 |
| 49 Costs   | 867 |

SECTIONS

|    |                                 |             |
|----|---------------------------------|-------------|
| 50 | Bar to issue of <i>mandamus</i> | PAGE<br>867 |
| 51 | Power to frame rules            | 867         |

PART III

OF PREVENTIVE RELIEF

|              |     |
|--------------|-----|
| Introduction | 867 |
|--------------|-----|

CHAPTER IX

OF INJUNCTIONS GENERALLY

|    |                                |     |
|----|--------------------------------|-----|
| 52 | Preventive relief how granted  | 870 |
|    | At the discretion of the Court | 870 |
| 53 | Temporary injunctions          | 870 |
|    | Perpetual injunctions          | 871 |

CHAPTER X

OF PERPETUAL INJUNCTIONS

|    |   |     |
|----|---|-----|
| 54 | Perpetual injunctions when granted                  | 871 |
|    | Discretion as to granting injunction                | 874 |
|    | Perpetual injunctions                               | 874 |
|    | Injunction to prevent breach of contract            | 875 |
|    | Right to or enjoyment of property                   | 876 |
|    | Property  | 876 |
|    | Easement of light and air                           | 877 |
|    | Continuing trespass                                 | 877 |
|    | Co sharers landlord and tenant etc                  | 877 |
|    | Nuisance  | 878 |
|    | Breach of Trust                                     | 879 |
|    | Waste   | 879 |
|    | Latent copyright and trade mark                     | 879 |
|    | Invades or threatens to invade                      | 879 |
|    | Multiplicity of judicial proceedings                | 879 |
|    | Damages for future injury                           | 879 |
|    |   | 880 |
| 55 | Mandatory injunctions                               | 880 |
|    | Mandatory injunction                                | 880 |
|    | May be granted although act completed               | 880 |
|    | Delay and acquiescence                              | 883 |
|    | Mandatory injunction against co sharers and tenants | 884 |
|    |   | 884 |
| 56 | <i>Injunction when refused</i>                      | 885 |
|    | Scope of the section                                | 885 |
|    | Stay of proceedings                                 | 886 |
|    | Injunction to prevent breach of contract            | 886 |
|    | Nuisance  | 886 |
|    | Acquiescence  | 886 |
|    | Equally efficacious relief                          | 886 |
|    | Plaintiff's conduct                                 | 886 |
|    | Personal interest                                   | 887 |

| SECTIONS   | PAGE |
|--|------|
| Injunction to perform negative agreement                           | 887  |
| Injunction to perform negative agreement                           | 888  |
| Negative agreement may be implied                                  | 889  |
| Proviso to the section   | 889  |
| Regulation of damages not a bar to an injunction under the section | 889  |

## SCHEDULE

[EASEMENTS REPAIRS]

*Inserted by Act VII of 1891*

4



## TABLE OF CASES.

---

- Aas t Benham, 715  
 Abaji Sitaram t Trimbak Municipality, 32, 156, 362, 376  
 Abbakke Heggadthi t Kinkhamma Shetty, 439, 446, 453  
 Abbas Khan t Nur Khan, 181  
 Abdool Hakim t Doorga Proshad 176  
 Abdool Hoosein t Goolam Hoosein, 356  
 Abdul t Husseni, 160  
 Abdul Ali t Goldstein, 644  
 Abdul Ali t Puran Mal, 444  
 Abdul Aziz t Appayasami, 12  
 Abdul Aziz t Bisdoo Singh, 296  
 Abdul Aziz t Masum Ali, 19  
 Abdul Gani t Nandlal 438 440, 442  
 Abdul Hak t Tumulari Vykuntam 710  
 Abdul Hashim Sahib t Kadir Batcha Sahib, 835  
 Abdul Hassan Khan t Rang Lal, 550  
 Abdul Hossain t Ram Charan Law 882, 883  
 Abdul Kadar t Mohamed, 853  
 Abdul Kayam t Bahadur Vithoba, 361  
 Abdul Majid t Khurode Chandra Pal, 110, 451, 453  
 Abdul Rahman Sahib & Co., 679  
 Abdul Rahman t Ghulam Muhammad 183  
 Abdul Rasul, *In re* 862, 864  
 Abdul Razze t Khandi Row 338  
 Abdul Razak v Mahomed Hussen 432  
 Abdul Wahid Khan t Shaluka Bibi 396  
 Abdulkadar t Mahomed 853  
 Abdulla t Mammod 151  
 Abdulla Khan t Girdhari Lal, 130  
 Abdullah t Ahmad, 813  
 Abdullah t Allah Diya, 150 671  
 Abdullakin Maung Ne Dun 206  
 Abel t Sutton 561  
 Abid Husain t Ganga Sahai, 366  
 Abraham t Raphael 301  
 Abraham t Sarup Chand, 602  
 Abraham t The Lodge Goodwill, 364  
 Abraham Ezekiel t Ramjusrav 332  
 Abullah t Allah Diya, 150, 671  
 Abu Mahomed t Chunder, 268  
 Acetos t Burns 572, 574  
 Aechhan Kuar t Thakur Das, 105  
 Acha Ranganaikammal t Acha Ramnaja, 386  
 Achal Ram t Kazim Husain Khan, 175, 178  
 Achratlal etc t Vijayam 226  
 Achutha Naidu t Oakley, Bowden & Co., 607  
 Ackermann t Ehrensperger 469  
 Adaitya Dass t Prem Chand 18  
 Adams t Broke 806  
 Adamson t Jarvis 301  
 Addikkalam Chetti t Marimuthu 280  
 Addison t Gandasequi, 631  
 Adhibai t Cursandas, 792  
 Adikesavan Naidu t Gurunatha, 428 772  
 Administrator General of Bengal t Juggeswar Roy, 208  
 Administrator General of Burma t Moolla, 444  
 Advocate General of Bengal t Ranee Surnomoye Dossee 2  
 Aftab Ali Khan t Akbar Ali Khan 848  
 Agace *Ex parte* 697  
 Agacio t Forbes 638  
 Aga Gulam Husain t A D Sasoon 303, 306  
 Aghore Nath Bannerjee t The Calcutta Tramways Co., 227 256  
 Agius t G W Colliers Co., 414, 421, 466, 506  
 Agnew t Indian Carrying Co 604  
 Agra Bank t Hamlin 42  
 Agra Bank s Claim 538  
 Agra and Masterman s Bank, *Pe, Fr parte* Asiatic Banking Corporation, 56  
 Agricultural Cattle Insurance Co t Fitzgerald, 357  
 Ah Choon t T S Firm 403

- Ah Shan Shoko v Moothra Chetty, 52  
 Ahinsa Bibi t Abdul Kader, 277, 279,  
 303, 304  
 Ahmed v Adjein, 799  
 Ahmed Hassan v Hassan Mahomed, 171  
 Ahmed Musaji v Hashim Ebrahim, 721  
 Ahmedabad Jubilee S & W Co v  
 Chhotalal, 201, 202  
 Ahmedabad Municipality v Smemanji,  
 378  
 Ahmedbhai v Framji, 692  
 Ahmedbhoy Hubibhoy v Vulleebhoy  
 Cassumbhoy, 176  
 Airey t Borham, 707  
 Ajit Singh v Bijai Bahadur Singh, 839  
 Ajudhia Prasad v Bakar Sajjad, 385, 394  
 Ajudhia Prasad t Lalman, 234  
 Akhtar Jahin Begam t Hazari Lal, 117,  
 369  
 Alagappa Chetti t Vellian Chetti, 303  
 Alamai t Positive Government Security  
 Life Assurance Co, 232, 249  
 Alcock, Ashdown & Co t Chief Revenue  
 Authority, Bombay, 866  
 A Khorasany v C Acha See Khorasany  
 (A) v C Acha  
 Alice Mary Hill t Clark, 164, 165, 186,  
 188, 202  
 Ali Saheb t Shabji, 8  
 Alimohamed t Bombay Municipal Com-  
 missioners, 863  
 Alla Baksh v Chuma, 164  
 Allahditta t Jamna Das, 799  
 Allcard t Skinner, 97, 99, 114  
 Allcard t Walker, 140  
 Alliance Bank t Broom, 28  
 Alliance Bank of Simla, Ltd t Amritsar  
 Bank, 588  
 Alliance Bank of Simla t Ghamandi Lal  
 Jani Lal, 543  
 Allkins t Jupe, 626  
 Allmuddy t Brahan, 562  
 Alokeshi Dassi t Hara Chand Das, 782  
 " " " " " " " " 827  
 Ambler t Bolton, 704  
 Amerchand & Co v Ramdas 143  
 Amin t Chand Guni, 28  
 Amir Chand t Ram, 182  
 Amir Dulhin t Administrator General  
 of Bengal, 886  
 Amir Khan v Amir Jan, 171  
 Amir Khan v Saif Ali, 372  
 Amiraju t Seshamra, 93, 95  
 Amiruddin t Mahamad, 751  
 Amjadennessa Bibi t Rahim Buksh, 102  
 171, 404.  
 Anakaran v Saidamadath, 790  
 Ananda Mohan v Ananda Chandra, 357.  
 Anandiram v Goza, 163  
 Anant v Gopal, 708, 878  
 Anant Bharthi t Sarap Singh, 318  
 Anant Das t Ashburner & Co, 223  
 Anant Krishna Modak t Sarsati  
 Padmanabh, 28  
 Anant Ram t Channu Lal, 679  
 Anantanarayanan t Savithri, 194  
 Anantha Rao t Surayya, 354, 375  
 Anarullah t Koylash, 828  
 Ancona t Marls, 582  
 Anderson t Sanderson, 663  
 Andrews t Belfield, 254  
 Andrews t Ramsey & Co, 618  
 " " " " " " " " 718  
 " " " " " " " " 718  
 " " " " " " " " 718  
 Anjaneyalu t Sri Venugopala Rice Mill  
 Co, Ltd, 184  
 Ankalamra v Bellam Chenchayya, 279,  
 280  
 Annada Mohan Roy t Gour Mohan  
 Mullick, 374  
 Annaji Rou v Ragubai, 8  
 Annamalai Chetty t Veerabadram Chetty,  
 443, 445  
 Annapurnamma t Akkaya, 277  
 Annoda Mohun Rai t Bhubhan Mohini  
 Debi, 88, 105  
 Annoda Persad t Dwarkanath, 604  
 Anrudh Kumar t Lachhmi Chand, 401,  
 406, 431  
 Antrobus t Wickens, 617  
 Anupchand Harchand t Champai Uger  
 chand, 246  
 Apaji t Apa 877, 879  
 Appa Dada Patil t Ramkrishna Vasudku,  
 298  
 Appa Dada Patil t Ramkrishna Vasudro  
 Joshi, 156  
 " " " " " " " " 102  
 " " " " " " " " 102  
 " " " " " " " " 102  
 " " " " " " " " 102  
 " " " " " " " " 102

- Appu v. Baran, 880  
 Appurani Nair v. Isaac Mackadan, 499  
 Arati Sagarayya v. Arati Subhaya, 24  
 Argos, Cargo ex., 731  
 Arjan Piller Asgar Ali, 442, 449, 450, 451  
 Arjan Das v. Hakim Pal, 431  
 Arjundas Hatiram v. Secretary of State for India, 424, 531  
 Arkansas Smelting Co. v. Helten Co., 265  
 Arlaja Navak v. Narai Kesavaji, 690  
 Armitage v. Ingle, 310  
 Armstrong v. Stokes, 638, 647  
 Arnell v. Arnell, 707  
 Arthur v. Barton, 571  
 Arula Mastry v. Wakuthu Chinnaven, 442  
 Arumunga Gounden v. Chinnammal, 24  
 Arumugam v. Duraimunga, 75  
 Arunachala Ivah v. Louis Dreyfus & Co., 698  
 Arunachalam Chettiar v. Krishna Aivar, 276  
 Arunachellam v. Malras Ry. Co., 520  
 Arunachellam Chetti v. Sultramanian Chetti, 467  
 Arya Praleshak Pratimishi Sabha v. Lahori Mal, 784  
 Aryodaya S. & W. Co. v. Javalprasad, 51  
 Aryodaya Sp. & Wg. Co. Ltd. v. Siva Virchanl, 290, 455  
 Asa Ram v. Karam Singh, 203  
 Asa Singh v. Sarda Singh, 159  
 Asan Kani v. Somasundaram, 698  
 Asherson v. Tredegar Dry Dock, etc., Co., 506  
 Ashgar Ali v. Debroos Banoo Begum, 105  
 Asiatic Banking Corporation, *Ex parte* Pe Agra and Masterman's Bank, 56  
 Asirvada Nadan v. Vellamuthu Nadan, 203  
 Askaram Choutmal v. E I R Co., 568  
 Asvath v. Chimabai, 259  
 Atkinson v. Cotesworth, 645  
 Atkins v. Amber, 645  
 Atlantic Mutual Insurance Co. v. Huth, 572  
 Atma Rai v. Sheobaran Rai, 792  
 Atmaram v. Hunar, 382  
 Atmaram v. Umedram, 356  
 Atool Chandra Mukerjee v. Shosheo Bhusan, 542  
 Attorney General v. Leeds Corporation, 884  
 Attorney General v. Staff elshire County Council, 882  
 Attorneys and Solicitors Act, *Re*, 173  
 Attwood v. Munnings, 566  
 Attwood v. Maule, 711  
 Auchterlony v. Charles Hill, 220  
 August, The, 670  
 Austin v. Manchester, etc., Ry. Co., 603  
 Australasian Steam Navigation Co. v. Morse, 572, 574  
 Australia, The, 572  
 Avatunnissa Beebe v. Karam Ali, 161  
 Ayerst v. Jenkins, 148  
 Ayyannath Chetty v. Sultramanis Iyer, 616  
 Ayyappaswami v. The Secretary of State for India, 851  
 Azima Bili v. Shamalinand, 105  
 Aziz Khan v. Duni Chand, 117  
 BARCOCK v. LAWSON, 544  
 Balchetti v. Venkataramana, 135  
 Babu Ram v. Ram Dival, 587  
 Balu Ram v. Sailun Nissa, 76, 77  
 Baburam Bag v. Madhab Chandra, 816, 817  
 Bachubai v. Shamji, 704, 710  
 Backhouse v. Hall, 716  
 Badeley v. Consolidated Bank, 500, 680  
 Badatannessa Bibee v. Amlika Charan, 107  
 Badische Co., *In re*, 168, 321, 336  
 Badrunissa v. Muhammad Jan, 402  
 Badu Mia v. Badrannessa, 161, 209  
 Bai Diwali v. Umedbhai, 374  
 Bai Kesserbai v. Narranji, 542  
 Bai Soma v. Chokshi Ishvardas, 476  
 Bai Viji v. Nansa Nagar, 165, 188  
 Bai Nath Das v. Shamanand Das, 424, 445  
 Baij Nath Singh v. Shah Ali Hosain, 442, 443, 447  
 Bailie's Case, 90  
 Baily v. De Crespigny, 328  
 Bain v. Fothergill, 426, 427, 428  
 Bainbridge v. Limestone, 207  
 Baines v. Ewing, 630  
 Baird's Case, 696  
 Bakatram v. Kharsetji, 838  
 Baker v. Hedgecock, 187  
 Balak Ram v. Dadu, 70  
 Balamba v. Krishnaya, 22

- Balangowda Bhumangowda & Gadigeppa, Bhumappa, 72
- Balaram & Southern Maratha Ry Co, 520
- Balaram, & c, Firm v Govinda Chetty, 325
- Balasundara Mudaliar & Mahomed Oosman, 180
- Baldeo v Mul Chand, 353
- Baldeo Das & Mohamaya, 181
- Baldeo Parshad & Miller, 230
- Baldeo Sahai v Harbans, 175
- Baldeo Sahai & Jumna Kummar, 180 181.
- Baldeo Singh & Bulaki Das, 110
- Balfour & Sea Fire Assurance, 401
- Balgobind & Bhaggu Mal 188
- Balkishan Das & Madan Lal, 110, 133
- Balkishen Das v Run Bahadur Singh, 442
- Bal kissen Das Daga & Kanhya, 305
- Balkrishna & Bank of Bengal, 504
- Balkrishna & Municipality of Mahad, 303
- Balkuraya & Sankamma, 456
- Ballapragada & Thummana, 158, 205, 226
- Balmakund Lal & Sohano Kueri, 858
- Baluswami Aiyar & Lakshmana Aiyar, 772
- Balvanta v Bira, 782
- Bamakrishna Ayyar & Muthusami Ayyar, 681
- Bama Sundari Das & Adhar Chunder Sarkar, 385, 394
- Bamford v Shuttleworth, 666
- Banamali Satpathe & Talna Rambari Patra, 279
- Banarsi Das v Sital Singh, 174
- Banda Ali & Banspat Singh, 93, 195
- Bani Madho Das & Kaunsal Kishor Dhusar, 242
- Bani Mancharam & Regina Stanger, 164
- Bani Ramchandra & Javawanti, 187
- Bank of Africa & Cohen, 12
- Bank of Australasia & Breillat, 695
- Bank of Bengal & Dinonath Roy, 746 864
- Bank of Bengal & Fagan, 561, 565 656
- Bank of Bengal & Macleod, 565
- Bank of Bengal & Ramanathan, 561.
- Bank of Bengal & Vabhoj Gangji 156, 189
- Bank of Bombay & Nandlal Thackersey das, 533.
- Bank of Bombay v Suleman Somji, 864
- Bank of Montreal v Stuart, 107
- Bank of New South Wales v Golburn Butter Factory, 539
- Bank of New South Wales & O Connor, 544.
- Banka Behary Dass v Raj Kumar Dass, 373
- Banke Behari & Sundar Lal 443, 447, 448
- Banku Behari Shaha & Krishto Gobindo, 87, 839
- Bannerman & White 121
- Bansi & Kanhaiya, 850, 876
- Bansi Dhar & Akhay Ram, 344
- Bansidhar v Babu Lal, 205
- Bansidhar v Bu Ali Khan, 448 450
- Bansidhar & Sital Prasad, 793
- Banta Singh v Diwan Singh, 852 855
- Banvard & M M Moolla, 243
- Banwari Das & Muhammad Mashiat, 443
- Bapu Apaji v Kashinath Sadoba, 744
- Bara Estate, Ltd & Anup Chand, 102
- Barber, *Ex parte*, 701
- Barber Maran & Ramana Goundan, 277 278, 279
- Bardwell & Lydall, 346, 471
- Baring & Corrie, 540, 568
- Baring & Stanton, 611, 616
- Barkatunnissa Begum v Debi Bakhsh, 105, 107
- Barker & Windle, 125
- Barnes v Youngs 709
- Barnett & South London Tramways Co, 663
- Barney, *Re*, 578
- Baroda Spg & Wg Co, Ltd v Satya narayen Marine & Fire Insurance Co, Ltd, 225
- Barrell, *Ex parte*, 781
- Barrow & Dyster, 637
- Barrow Lane and Ballard & Philip Phillips & Co, 135
- Barry & Longmore, 641
- Bartlett & Pentland, 569
- Bartlett & Parnell, 670
- Bartram & Lloyd, 665
- Barwick & English Joint Stock Bank, 660
- Basanti Kumar & Kusum Kumar, 549
- Basanta Kumar Choudhury & Madan Mohun Choudhury, 200

- Baiswary v Subbarazu, 442  
 Baidoo Rai t Jhagru Rai, 229  
 Baidoo Ram Sirup t Dilukh Rai Sewak Ram, 364  
 Bashir Ahmad t Sadiq Ali, 222  
 Baskcomb t Beckwith, 129, 778  
 Bassu Kuat t Dium Singh, 379  
 Bateson t Gosling, 486  
 Batuk Nath Mandal t Bepin Bihari Chandhuri, 396  
 Baumwooll Manufacture t Furness, 571  
 Bawden t London, etc, Assce Co, 632  
 Bayendale t. Seale, 791  
 Beal t South Devon Ry Co, 604  
 Beall, *Ex parte*, 620, 623  
 Beanland, Doe d t Hirst, 357  
 Beattie t Lord Fbury, 652, 653  
 Beaumont t Boulbee, 593  
 Beaumont t Reeve, 201, 202  
 Bechervaise t Lewis, 500, 506  
 Bechuanaland Exploration Co t London Trading Bank, 9  
 Beck, Thomas t Thomas Siddle 299  
 Beckett t Addyman 477  
 Beckham t Drake, 262, 263, 690  
 Behari Lal t Asaram, 445  
 Behari Lal t Habiba Bibi, 105  
 Behari Lal t Parbhu Lal, 625  
 Behari Lal t Ram Ghulam, 274  
 Behari Lal v Jagodish Chunder, 152  
 Behn v Burness, 121, 321  
 Beir (Paul) t Chotalal Javerdas *See* Paul Beir t Chotalal Javerdas  
 Bejoy Kumar Sen t Kusum Kumari Debi, 393  
 Beldon t Campbell 571  
 Bell t Auldjo 569  
 Bell v Balls 570 574  
 Beluze Motor Supply Co t Cox 558  
 Bemisena Rao t Narayana Rao 389  
 Bemola t Mohun, 678, 698  
 Benarasi Prashad t Mohiuddin Ahmad, 327  
 Bengal Coal Co t Homee Wadia & Co 43, 307  
 Bengal N W R Co t Bansidhar, 516  
 Bengal National Bank t Jatindra Nath Mazumdar, 693  
 Bengal Stone Co, Ltd t Joseph Hyam, 95  
 Beni Madho Pragwal t Hira Lal 850, 876  
 Benoit t Prudhomme, 320  
 Bensley t Bignold, 147  
 Benson t Duncan, 572  
 Bontall, Horsley and Baldry v Vicary, 561.  
 Berners t Fleming, 762  
 Berridge t Berridge, 509  
 Bettini t Gye, 283, 314  
 Betts t Gibbins, 626  
 Beulah Park Estate, *Re*, 499  
 Bevan t Waters, 536  
 Bevan t Webb, 710, 714  
 Bexwell t Christie, 598  
 Beyfus t Lodge, 794  
 Bhagabati t Narayan 286  
 Bhagru Lal t De Gruyther, 680  
 Bhagtidis t Oliver, 725  
 Bhagwant Gopal v Appaji, 326  
 Bhagwan Das t Bhajju Mal, 157  
 Bhagwan Dei t Murari Lal, 183  
 Bhagwan Singh v Munshi Ram 204  
 Bhagwandis t Burjorji, 240, 245, 600  
 Bhagwandis Narotmundis t Kanji Deoji, 240, 311, 600  
 Bhagwandis v Secretary of State for India, 460, 474, 487  
 Bhagwandis t Shiv Dial, 52  
 Bhagwat Dayal Singh t Debi Dival Sahu, 174, 175  
 Bhailal t Kalyanrai, 332  
 Bhaidin t Ibrahim, 749  
 Bhawani Singh t Mauli Masbah ud din, 604  
 Bhicaji t Pirojshaw, 878  
 Bhicoobai t Hariba 400  
 Bhikabhai t Bai Bhuri, 476  
 Bhikanbhai t Hiralal 150  
 Bhima t Ningappa 194  
 Bhimbhat t Yeshwantrao 103, 111, 209  
 Bhuwa Mahadshet t Shivaram Mahadshet 194 199  
 Bhojabhai t Hayem Samuel, 640  
 Bhola Nath v Fatch Singh, 444  
 Bhola Nath t Mul Chand, 241, 615  
 Bhola Ram Harbans Lal t Bhagat Ram 66, 75  
 Bholaram t The Corporation of Calcutt 865  
 Bholi Baksh t Gulda, 164  
 Bhora Hazari Lal t Bhora Saurang Lal, 387  
 Bhudar Chandra t Betts, 325  
 Bhujendro Bhusan t Trigunanath, 848  
 Bhundal t Pandol, 752  
 Bhupati Chrandy t Golam Fubbar Chowdry, 156

- Bhupendra Nath t Ranjit Singh, 848  
 Bhut Nath Chatterjee t Rama Nath Naskar, 113  
 Bhut Nath Das v Girish Chandra, 723  
 Bhuvanagiri Subbarayudu t Maradugula Venkataratnam, 159  
 Bibee Solomon t Abdool Azceez, 136  
 Bichook Nath t Ram Lochun, 438  
 Bickerton t Burrell, 654  
 Biddell Bros v E Clemens Horst Co, 336  
 Biddle t Bond, 634  
 Biddomoye Dabee t Sittaram, 550  
 Biederman t Stone, 624  
 Biggs t Gordon, 616  
 Biggs v Lawrence, 663  
 Bikutti v Kolandan, 854  
 Bilasiram t Gubbay, 412  
 Bilborough t Holmes, 348  
 Billings v The Uncovenanted Service Bank, 203, 206  
 Bindu Kuar t Bhonda Das, 388 399  
 Bindoo Dasya v Chota, 203  
 Bindeshari Prasad t Lekhraj Sahu, 171, 187, 404  
 Bindeshri Parshad t Jairam Gir, 798  
 Bindeshri Prasad v Sarju Singh, 159  
 Bindu t Jahnabi, 879  
 Binduhashini Dassi v Harendra Lal Roy, 387  
 Binney v Mutrie, 703  
 Bir Bhaddar t Sarju Prasad 650  
 Bird, *Ex parte*, 666  
 Bird v Brown, 586  
 Birendra Nath Basu t Basanta Kumar Basu, 170  
 Birmingham Banking Co, *Ex parte*, 675  
 Bishambhar Nath v Fateh Lal, 678  
 Bishambhar Nath t Sheo Narain, 678  
 Bishan Chand t Radha Kishan Das, 781  
 Bishen Chand t Narain Singh, 447  
 Bisheshar Das v Govind Ram, 152  
 Bisheshar Dayal t Jevala Prasad, 241  
 Bishi Chand v Kacchu Mal, 241  
 Bishop, *Ex parte*, 624  
 Bishop t Countess of Jersey, 691  
 Bishun Pershah t Siddique, 343 346  
 Bishunath Kunwar t Sheo Bahadur Singh, 281  
 Bishunath Sahay t Nanku Prasad Singh, 290  
 Bissessar Dass Daga v Vas, 784  
 Bissouri v Baroda Kanta Roy, 849  
 Biswanath t Somewar, 345  
 Blackburn v Scholes, 569, 588  
 Blackburn t Vigors, 633  
 Blackburn Bobbin Co t T W Allen & Sons, 328, 331  
 Blackett t Bates, 774, 788  
 Blackmore (or Blakemore) v Bristol and Exeter Rail Co, 512, 515  
 Blackwell & Co v Jones & Co, 24  
 Blades v Free, 596  
 Blair v Bromley, 691  
 Blakemore (or Blackmore) t Bristol and Exeter Ry Co, 512, 515  
 Blay t Pollard, 827  
 Bligh v Davies, 621  
 Blisset v Daniel, 709  
 Blumberg t Life Interests etc, Corporation, 563  
 Boehm t Goodall, 728  
 Boggiano & Co t The Arab Steamers Co, Ltd, 334, 519  
 Bolisetty Venkatanarayana t Vekkala gaddalakshmi Punneyya, 406  
 Boistub Churn t Wooma Churn, 153  
 Boja Sellappa Reddy t Vridhachala Reddy, 391  
 Bolton v Lambert, 582  
 Bolton t Salmon, 483  
 Bolye Chund Sing t Moulard, 276  
 Bombay and Persia Steam Navigation Co t Rubattino Co, 334  
 Bombay Co, Ltd t Official Assignee, Madras 491  
 Bombay, Municipal Corporation of t Cuverji Hirji, 616  
 Bombay Saw Mills Co, *Re*, 540 620  
 Bombay Steam Navigation Co t Vasudev Baburao, 524  
 Bombay (Trustees of Port) v Bombay Municipal Corporation, 865  
 Bombay United Merchants Co t Doolu bram, 642  
 Bonar t Macdonald, 480  
 Bond v Gibson, 694  
 Bonita The, 572  
 Bonner t Tottenham etc, Building Society, 383 384  
 Bonnewell t Jenkins, 52  
 Bonser t Cox, 480 481, 503  
 Bonwang Raja Chellaphroo t Binga Behari Sen, 453  
 Boorman t Brown, 569  
 Borries t Hutchinson, 407  
 Borries t Imperial Ottoman Bank, 619

212 213 436  
 Indravya v. Harish 153  
 Indrappa Kulkarni v. Hindustan Co-  
 operative Insurance Society Ltd. 473  
 Brannwell v. Spiller 679  
 Brannan v. Barnett 738 739  
 Brannan v. Scott, 732  
 Brant v. Lawrence 274  
 Branson v. Appasami 782 783  
 Braunstein v. Accidental Death Insur-  
 ance Co. 25  
 Bray v. Chandler 617  
 Bridges v. Garrett 513 565  
 Bright *Ex parte In re* Smith 52  
 Briji Bhukhan v. Durga Das 851  
 Briji Bhukhan v. Samuelson 436 444  
 Brinkman v. Abdul Chafur 164  
 Bristol v. Taylor 70  
 British Columbia Sawmill Co. v. Nettle-  
 ship 413 663  
 British and Beningtons v. N. W. Cachar  
 Tea Company 284 351  
 British and Foreign Marine Insurance Co.  
 Ltd. v. India General Navigation and  
 Ry. Co. Ltd. 518  
 British Waggon Co. v. Lea & Co. 29  
 British Westinghouse etc. Co. Case  
 393, 421  
 Broad v. Thomas, 616  
 Broadbent v. Ledward 552  
 Brogden v. Metrop. Ry. Co. 34 52, 63

Pravat v. Quiloe Bank 67  
 Bryant & Birmingham v. Central Sav-  
 ing Bank v. Finlay 619  
 Bulb Sahar v. Buhar Sahai 781  
 Bullock v. Howe 726  
 Bullock v. Wilford, 123  
 Bullen v. Sharp 672, 673  
 Buller v. Harrison 666  
 Binaroo Dass v. Gholam Hossein 618  
 Bura v. Madia Shih 431  
 Burelle v. Clark 82  
 Burelle v. Wille 701 721 874  
 Burden *Ex parte*, 478  
 Burdett v. Barkus 707  
 Burge v. Ashley and Smith 21  
 Burgess v. Burgess 677  
 Burgess v. Eve 47  
 Burgeon v. Sharpe 573  
 Burjorji v. Bhagwandas 240  
 Burma Rangoon Red Line Kalapali Sultana  
 222  
 Burland v. Earle 610  
 Burn v. Brown 541  
 Burn & Co. v. McDonald, 888 889  
 Burn & Co. Ltd. v. Thakur Sahib of  
 Morvi State, 324  
 Burn & Co., Ltd. v. Thakur Sahib of  
 Lukhdirjee 282  
 Burnard v. Haggis, 526  
 Buron v. Denman 583  
 Butchart v. Dresser, 719

- Byrne & Reid, 708  
 Byrne & Van Tienhoven, 79
- CABILL & Dawson, 621, 680  
 Calcutta Port Commissioners & Suraj  
 Mull Jagan, 879  
 Calder & Dobell, 636, 650, 651  
 Callanji & Narsi, 784, 800, 822, 876, 889  
 Calvert & London Dock Co., 494, 495  
 Calye's Case, 521  
 Camparari & Woodburn, 597  
 Campbell & Hassel, 569  
 Canning & Farquhar, 51  
 Cape Breton Co., *Re*, 610  
 Carhill & Carbolic Smoke Ball Co., 57, 232  
 Carlsle and Cumberland Bank Co. &  
 Bragg, 85  
 Carlisle, Nephews & Co. & Ricknauth  
 Bucktearmull, 215  
 Carmichael & Evans, 709  
 Carmichael's Case, 589, 590  
 Carr & Jackson, 641  
 Carrion & Rodrigues, 567  
 Carter *Re*, 622  
 Carter & Agra Savings Bank, 230  
 Carter & Wake, 546  
 Carter & Whalley, 685  
 Carter & White, 488  
 Cary & Webster, 666  
 Casarmajor & Strobe, 774  
 Casey's Patents, *Re*, 25  
 Cassaboglou & Gibbs, 557  
 Cassim Ahmed & Eusuf Haji Ajam, 586  
 Catterall & Hindle, 569  
 Cave & Cave, 633  
 Cawnpore, Collector of & Kedari, 403  
 Cella, The, 623  
 Chabildas Lalloobhai & Dyal Mowji, 631  
 Chadma Lal & Kishen Lal, 157  
 Chait Ram & Mussammat Nathi, 161  
 Chaitram & Bridhichand, 222  
 Chalamayya & Varadappa, 678  
 Challa Bilappa & Kanuparthi, 629  
 Chalmers, *Ex parte*, 201  
 Chamathari & Triguna Nath, 300  
 Chamberlain & Williamson, 262  
 Chambers & Goldthorpe, 227  
 Champai Ram & Tulshi Ram, 558  
 Champernown & Scott, 541  
 Champsey & Gill & Co., 222, 239  
 Champsey Doss & Gordhadas Kessowji,  
 157  
 Chan Lai Deo & Srinivasa, 386, 319
- Chandra Kanta Das & Parasullah Mullick,  
 220, 325  
 Chandra Mal & Gonda Singh, 537  
 Chandridaya & Bhagban, 390  
 Chandraprasad & Varajlal, 204  
 Chandulal Suklal & Sidhruthrai Soojanrai,  
 248, 600  
 Changi Mal & Sheo Prasad, 372  
 Chanran Das & Amir Khan, 853  
 Charamudi & Raghavulu, 263  
 Charan Das & Jamna Devi, 852  
 Charlesworth & MacDonald, 213, 889  
 Charter & Trevelyan, 606  
 Chase & Westmore, 537  
 Chatarpal Sharma & Jagannath Das,  
 876  
 Chatring & Whitechurch, 112  
 Chatur Jagai & Tulsi, 204  
 Chaturbhuj & Kalyani, 831  
 Chedambara Chetty & Renja Krishna  
 Muthu, 111, 174  
 Chedi Lal & Bhagwan Das, 397  
 Chedworth & Edwards, 604  
 Chekka & Gajjala, 241, 625  
 Chelapathi & Surayya, 599  
 Chenchuvenkatanigah Chetty & Pad  
 manathan Chetty, 724  
 Chengravelu Chetti & Sons & Akarapu  
 Venkauna & Sons, 312, 317  
 Chenvirappa & Puttappa, 373  
 Cherulomen & Ismail, 161  
 Chetoomal Bulchand & Shankerdas  
 Girdharilal, 33  
 Chettyar (V E A) Firm & Income Tax  
 Commissioners, 866  
 Chew & Jones, 531  
 Chhaganlal & Dhondu, 877  
 Chhitral Mal & Jagan Nath Prasad, 76  
 Chhogmal & Jainarayan, 240  
 Chudambaram Chetti & Pichappa Chetti,  
 605  
 Chudambaram Chettyar & Tinnevelly  
 Sugar Mills Co., 622  
 Chief Commissioner of Income Tax &  
 North Anantapura Gold Mines Ltd.,  
 865  
 Chinnman Singh & Subran Kuar, 157  
 Chinnai & Piddi, 436, 449  
 Chinnaramanuja Ayyangar & Padma  
 tha Pillayan, 277, 643, 698  
 Chinnasami & Amalavanna, 850  
 Chinnasami & Rathnaswami, 387  
 Chinnaswami & Krishnaswami, 367, 368



- Dina Bandhu Saha t Abdul Latif Molla, 661
- Dingle t Hare, 568
- Dinkarrao t Narayen 158, 263
- Dip Narain Rai v Dipan Rai, 445
- Dixon, *Ex parte*, 568
- Dixon t Clarke, 270
- Dixon t Stansfield 541
- Dixon t Steel, 499
- Dixon t Winch, 633, 634
- Dodson t Downey, 708, 763
- Doe d Beanland t Hirst, 357
- Doherty t Allman, 868
- Dominion Coal Co t Dominion Iron & Steel Co, 763
- Donald t Suckling, 526, 755
- Doolubdass Pettamberdass t Ramlohl Thackoorseydass, 231
- Doorga Singh t Sheo Pershad, 185
- Dorabji t Muncherji, 513
- Dorabji Tata t Bance, 251
- Dorusami v Vaithilinga, 205
- Dorasinga t Arunichalam 308
- Dori Lal t Patti Ram, 396
- Doshi Talal shi t Shah Ujamsi Velsi 234, 235 237, 242, 246 248, 249, 250
- Douglas, *In re*, 622
- Douglas t Rhyl Urban District Council, 378
- Douglas Norman & Co, *Re*, 542
- Dowlat Ram v Jivan Mal, 547
- Downham v Williams, 636
- Dowse t Gorton, 717
- Dresser t Norwood, 631
- Drew v Nunn, 596
- Drinkwater v Goodwin, 540, 569 645
- Dugdale v Levering, 462
- Duke of Leeds t Earl of Amherst, 883
- Dular Chand v Bilram Das, 303
- Dulari v Vallabdas Praggi, 181
- Dulichand t Ramkishan Singh, 404
- Dulla Singh t Khazana, 397
- Dullabhdas t Lakshmandas, 438, 448.
- Duncan t Hill 623
- Duncan Fox & Co t North and South Wales Bank, 493
- Duncan Fox & Co t Schrempft & Bonke, 336
- Duncuft v Albrecht, 763
- Dunmore, Countess of t Alexander, 40
- Dunn t Bucknall Bros, 410
- Dunn v MacDonald 651
- Dunne v English, 610
- Durell v Pritchard, 882
- Durga v Raghu, 723
- Durga Bakhsh Singh v Mirza Muham mad Ali Beg 81
- Durga Charan Chandra t Ambica Charan Chandra 385
- Durga Prasad t Baldeo, 17, 201
- Durga Priya Chowdhury v Durga Padma Roy, 473, 477
- Durga Prosonno Bose t Raghu Nath Dass 726
- Durgabai t Sarasvatibai, 550
- Durham, Mayor of v Fowler, 495
- Dutton t Marsh, 636
- Dutton v Poole, 19, 20, 21
- Dwarika Nath v Priya Nath, 24
- Dwarkanath t The Rivers Steam Navigation Co, Ltd, 523
- Dwijendra Nath Mullick t Gopiram-Gobindaram, 172
- Dyer v Hargrave, 129
- Dykes Estate, *Re*, 814
- Dyster t Randall, 762
- EADS v Williams, 798
- Eagleton t East India Ry Co 534
- East India Co v Oditchun, Paul 226
- East India Co t Tritton, 667
- East India Ry Co v Nilkanta Roy, 520
- East India Ry Co t Shiv Prasad, 520
- East Indian Ry Co t Bunyad Ali, 520
- East Indian Ry Co t Kalidas, 517
- East Indian Ry Co v Kanak Behari, 520
- Eastern Mortgage & Co v Muhammad Fazlul Karim, 383, 384
- Eastwood t Kenyon, 202
- Ebrahim Haji Yakub t Chunilal, 596
- Ede t Kanto Nath Shaw, 353
- Edelstein t Schuler & Co, 9
- Edgar t Fowler, 592
- Edgington v Fitzmaurice, 117
- Edmunds v Bushell, 564, 656
- Edmunds t Wallingford, 384
- Edwards, *Ex parte* 621, 667
- Edwards t Havill 671
- Edwards t Holding 666
- Egerton v Lord Brownlow, 612
- Egbert v National Crown Bank, 484
- Ehrman t Bartholomew, 213
- Eitel Bieber & Co t Rio Tinto Co, 169
- Eibinger Actien Gesellschaft t Armstrong, 406
- Eibinger Actien Gesellschaft t Claye, 639

- Lley t Positive Government Security  
 Life Insurance Co, 202  
 Lhas t Govind, 616  
 Eliason t Henshaw, 54  
 Elford t Lord Llandaff, 794  
 Ellen t Topp, 381  
 Elliott t Crutchley, 329, 380  
 Ellis t Emanuel, 470  
 Ellis t Goulton, 666  
 Ellis t Pond, 623, 624  
 Ellis t Thompson, 663  
 Elphuck t Barnes, 257  
 Elphinstone, Lord t Monkland Iron and  
 Coal Co, 435  
 Emmerson t Heelis, 570  
 Emperor t Parakh, 539  
 Empress Engineering Co, *Re*, 581, 643  
 Empress of India Cotton Mills Co t  
 Nasser Chunder Roy, 290, 455, 458  
 Enactoolah t Kishen Soondar, 752  
 Enaytulla t J. N. Roy & Co, 723  
 Engell t Fitch, 416, 426, 427  
 England t Curling, 701, 788  
 England t Davidson, 195  
 England t Marsden, 384  
 Equitable Fire and Accident Office t  
 The Chung Wo Hong 50  
 Erie County Natural Gas etc, Co t  
 Carroll, 422  
 Erlanger t New Sombrero Phosphate  
 Co, 797  
 Ertaza Hossein t Bany Mistry, 754  
 Esdaile t La Nauze, 566  
 Eshahq Molla t Abdul Bari Haldar, 272  
 Eshan Kishor t Haris Chandra, 159  
 Eshoor Doss t Venkatasubba Rau 234,  
 236, 247  
 Esposito t Bowden 168 335, 336  
 Etwaria t Chandra Nath 76  
 European and Australian Royal Mail Co  
 t Royal Mail Steam Packet Co 534  
 European Bank, *Re*, 666  
 Evans t Bretnbridge, 505  
 Evans v Coventry, 727  
 Evans t Edmonds, 115  
 Ewin Shank Wa t U Po Nyun, 882  
 Ezekiel Abraham t Ramjusrav, 332  
 Ezekiel Moses v Russa Engineering  
 Works, Ltd, 723  
 FADU JHALA t Gour Mohun Jhala, 752,  
 756  
 Fairlie t Fenton 636  
 Fayazunissa t Bajrang Bahadar Singh,  
 383  
 Faki Ibrahim t Faki Gulam, 816  
 Fakir Chand t Akunda, 854.  
 Fakirchand t Anund Chunder, 856  
 Fakirchand Lalchand t Doolab Govindji,  
 601  
 Falck t Williams, 84, 90  
 Falcke t Gray, 757, 761, 762  
 Fannindra Naram t Kacheman Bibi, 28.  
 Fanny, The, 573  
 Fardunji t Jamsedji, 823  
 Faridunissa v Ftizad Husain, 762  
 Farid un Niss t Mukhtar Ahmad, 105  
 Farman Ali t Mohammad Nawaz Khan,  
 843  
 Farquharson t King, 666  
 Farrant t Barnes, 515  
 Farrer t Lacy, 570  
 Farrow t Wilson, 261  
 Fateh Singh t Sanwal Singh, 155  
 Fati Ibrahim t Fati Gulam, 816  
 Fatima Khatoon t Mahomed, 403  
 Fatma t Ali Mahomed, 160  
 Fatmabai t Pirbhai, 304  
 Fawcett & Holmes' Contract, 769  
 Fazal t Mangaldas, 127  
 Fazal Husain v Jiwan Ali, 342  
 Fazl Ilahi t East India Ry Co, 417, 628,  
 658  
 Fazulbhoy t Credit Bank, 72, 689  
 Featherston t Wilkinson, 409  
 Featherstonhaugh t Fenwick, 713, 714  
 Felthouse t Bindley, 34, 55  
 Fenn v Bittleston, 626  
 Fenn t Harrison, 564  
 Fenwick *Re*, 633  
 Feret t Hall 116  
 Ferguson v Um Chand Boid, 567  
 Ferguson v Wilson, 783  
 Fernandes (Rose) t Joseph Gonsalves, 69  
 Ferrand t Bischoffsheim, 618  
 Ferraers v Robins, 598  
 Filby v Hounsell, 50  
 Findon t McLaren 664  
 Fine Cotton Spinners', etc, Association  
 t Harwood, 677  
 Fink v Buldeo Dass, 587  
 Finlay, *Re*, 624  
 Finlay t Churney, 262  
 Finlay Muir & Co t Radhakissen, 418  
 Firbank t Humphreys, 653  
 Fischer t Kamala Naicker, 174

- Fischer v The Secretary of State for India*, 841, 845  
*Fisher & Co v Apollinaris Co*, 170  
*Fisher v Bridges*, 148  
*Fisher v Cutbell*, 686  
*Fisher v Drowitt*, 616  
*Fisher v Marsh*, 638  
*Fisher v Smith*, 621  
*Fitzherbert v Mather*, 632  
*Fitz Holmes v Bank of Upper India, Ltd.*, 452  
*Fitzroy Steel Co, Re*, 633  
*Fleming v Bank of New Zealand*, 582  
*Fleming v Koegler*, 321  
*Fleming v Hector*, 674  
*Fletcher v Bealey*, 879  
*Flight v Booth*, 769  
*Foakes v Beer*, 361  
*Forbes v Jackson*, 499  
*Forbes v Secretary of State for India*, 404  
*Ford v Stier*, 91  
*Foreman v Great Western Ry Co*, 560  
*Forth v Simpson*, 622  
*Foster v Chetty*, 342  
*Foster v Dawber*, 361  
*Foster v Mackinnon*, 85, 86  
*Fowkes v Manchester and London Assurance Association*, 83  
*Fowler v Fowler*, 825  
*Fox v Clifton*, 684  
*Frampton, Ex parte*, 567  
*Fraser & Co v Bombay Ice Manufacturing Co*, 215, 216, 217  
*Fray v Voules*, 568  
*Frazer v Jordan*, 492  
*Frazer v Marsh*, 571  
*Freeman v East India Co*, 572  
*Freeth v Burr*, 282, 283, 314, 322  
*French v Howie*, 650  
*French v Styrring*, 670  
*Friend v Young*, 717  
*Frith v Forbes*, 541  
*Frith v Frith*, 590  
*Frixione v Tagliaferro*, 624  
*Frost v Knight*, 287  
*Frost v Oliver*, 571  
*Fry v Lane*, 101  
*Fry v Smellie*, 630  
*Fuli Bibi v Khokai Mondal*, 839  
*Fullerton v Provincial Bank of Ireland*, 28  
*Fullwood v Akerman*, 616  
*Furnivall v Coombes*, 613  
*Fut Chong v Maung Po Cho*, 524  
*Futteh Ali v Gunganath Roy*, 389  
*Fuzlur Rahman v Krishna Prasad*, 752  
*Lyfe v Arbuthnot*, 841  
  
 GABRIEL (THOMAS) & SONS v Churchill and Son See *Thomas Gabriel & Sons v Churchill*  
*Gadd v Houghton*, 637, 640  
*Gaddar Mal v Tata Industrial Bank*, 49, 61, 62  
*Gadu Bibi v Parsotam*, 697  
*Gaetano and Maria, The*, 570  
*Gaffur v Bhikaji*, 817  
*Gajadhar v Jagannath*, 200  
*Gajadhar Singh v Hari Singh*, 841.  
*Gammeter v The Collector of Patents & Designs*, 863  
*Ganapathy v Munisawmi*, 206  
*Gandha Horliah v Janoo Hassan*, 335  
*Gandla v Sivanappa*, 850  
*Gandy v Gandy*, 24  
*Ganesh v Dasson*, 750  
*Ganesh v Vishnu*, 112  
*Ganesh Dal Ishar Das v Ram Nath*, 316  
*Ganesh Flour Mills Co v Puran Mal*, 581  
*Ganesh Lala v Bapu*, 72  
*Ganesh Rai v Bhushu Rai*, 750  
*Ganesh Ramchandra v G I P Ry Co.*, 290  
*Ganga Baksh v Jagat Bahadur Singh*, 111  
*Ganga Dayal v Bachehu Lal*, 444  
*Ganga Ghulam v Tapesbri Prasad*, 850, 856  
*Ganga Prasad v Ram Dayal*, 203  
*Ganga Ram v Chandan Singh*, 358, 359  
*Ganga Ram v Devi Das*, 179, 195  
*Gangadas v Jehondas*, 246  
*Gangadas v Jogendra*, 391  
*Gangadhar v Damodar*, 154  
*Gangadhar v Kasinath*, 811  
*Gangaram v Laxman*, 744  
*Gangaram v The Secretary of State for India*, 851  
*Gangayya v Venkataramiah*, 679  
*Ganges Manufacturing Co, Ltd v Indra Chand*, 222  
*Ganges Steam Car Co, Re*, 650  
*Ganpat v Adarji*, 8  
*Ganpat v Annaji*, 708  
*Ganpat v Lahana*, 181  
*Ganpat v Mahadeo*, 351, 352

Ganpat Prasad t Sarju, 652  
 Ganrishankar t Ibrahim Ali, 813  
 Garapati Narasimudu t Basara Sankar  
     ram, 586  
 Gardner t Baillie, 566  
 Gardner t Walsh, 354  
 Garland t Jacomb, 700  
 Garner t Murray, 705, 706  
 Garth t Howard, 663  
 Garwood's Trusts *In re* 708  
 Gauri Datt t Bandhu Pandey, 189  
 Gauri Datt v Nanik Ram, 410  
 Gauri Mal Narain Das t Secretary of  
     State for India, 521  
 Gauri Shanker t Mumtaz Ali Khan 101,  
     153  
 Gaurmath Mookerjee t Madhumani  
     Peshkar, 164  
 Gausson t Morton 589  
 Geere t Mare, 148  
 Geipel t Smith 168  
 Gell v Taja Noora 863  
 Gendan Lal t Shahzadi 403  
 General Billposting Co t Atkinson 213  
     283  
 General Share Trust Co t Chapman 630  
 George t Clagett 648 649  
 George Whitechurch Ltd t Cavanagh  
     88, 745  
 Geresh Chunder t Bhuggobutty 105  
 German Mining Co s Case 706  
 Ghansham t Moroba 877  
 Ghansham Singh t Daulat Singh 430  
 Ghulam Husam t Mahammad Husam  
     819  
 Ghulam Mohammad t 603  
 Ghulam Mohiv ud Din Nand  
     171  
 Chumal Ram Chan Ira Rao  
 Ghurnav t National Bank t 400  
 Gilaud t G F Ry Co 34  
 Gilis t Grev, 572  
 Gihlin t McMullen 516 604  
 Gibson t Crick 617  
 Gilson t May, 619  
 Gibson t Winter, 645  
 Gilley t Lord Palmerston t 13  
 Gieve, J e, 233, 234, 238  
 Gilbert, *Ex parte*, 863, 865  
 Giles t Edward 719  
 Gillett t Thornton 713  
 Gilman t Hhon, 665  
 Girdhari Lal t Crawford, 742

Girdhari Lal t Palaniappa Mudali, 850  
 Girdhari Singh v Neeladhar Singh, 180,  
     182  
 Girdharilal t Eagle Star & British  
     Dominions Insurance Co, Ltd, 225  
 Girdharilal v Manikamma 373  
 Girijanund t Sailajanund, 189, 194  
 Girish Chandra t Kunja Behari 416  
 Girraj Baksh v Kazi Hamid Ali 378  
 Gitabai t Balaji, 822  
 Gladstone t King, 632  
 Glassbrook t Richardson 708  
 Glassington t Thwaites, 715  
 Glegg t Bromley, 28  
 Glenwood Lumber Co t Phillips, 747  
 Gloucester Municipal Election Petition,  
     44  
 Gluckstein t Barnes 610  
 Glynn t Margetson, 65  
 Gnanabhai t Srinivasa Pillai 163  
 Gnanasambanda Pandara Sannadhi t  
     Velu Pandaram 184  
 Gobardhan Das t Jai Kishen Das, 93,  
     101, 172  
 Goberdhan Singh t Ritu Roy 373  
 Gobind Chunder t Srigo bind 301  
 Gobind Chunder Sein t Ryan 551  
 Gobind Das t Sarju Das 203 204  
 Gobind Prasad t Chandar Sekhar 301,  
     300  
 Goculdas t Iakhmidas 177  
 Goculdas Madhavji t Narsu Yenkaji 333,  
 Godhanram t Jahormull 605  
 Godin t London Assurance Co 623,  
 Godwin t Francis 653  
 Gogun Chunder Ghose t Dhuronidhur,  
     305 309  
 Gokal Chund t Khwaja Ali 440  
 Gokulchand t Rahaman, 280  
 Gokuldas t Gulabrao 370  
 Gokam Abhin t Hem Chan Ira 72  
 Goldfarb t Bartlett 479  
 Golla Nagalhusanam t Kanakala 72  
 Comer *Ex parte* 619  
 Good *Ex parte* 301 493  
 Goode t Harrison 657 658  
 Goodson t Brooke 500  
 Goodson t Grierson, 193  
 Goodson t Pihardson 883  
 Goodwin t Roberts 658  
 Gooroo Dass Dutt t Ooma Churn Poy,  
     345  
 Gopal Daji t Gopal Bin Sonu, 473

- Gopal Das : Hari Das, 641  
 Gopal Ramchandra : Gangaram Anand Shet, 8, 176  
 Gopal Sahai Bichha Lal : Dhanu Ram Ram Gopal, 193  
 Gopal Singh : Bhawanu Prasad, 466, 478  
 Gopala Chetty v Vijayaraghavachariar, 729  
 Gopalray : Kallappa, 153, 188  
 Gopaludu : Venkataratnam 438, 442, 443  
 Gopeshwar : Jadav Chandra, 453  
 Gopeshwar Banerjee : Brojo Sundari Devi, 397  
 Gopi Ram : Jeot Ram 263  
 Gopilal Bhawaniram : Pandurang 309  
 Gordhanlal : Darbar Shri Surajmalji, 397  
 Gordon : Hertford, 812  
 Gordon : Street, 132  
 Gorio : Vallabhdas 723 724  
 Gosling : Gaskell, 579, 673  
 Goswami Shri Purushotamji Maharaj : Robb 155  
 Gour Chandra Das : Prasanna Kumar Chandra, 355 356  
 Gourchandra : Protapchandra, 491  
 Gouri Shankar Agarwalla : H P Motra, 330  
 Goverdhandas : Bank of Bengal 500 501  
 Govind : Apathsahay : 771  
 Govind : Picheco, 167  
 Govind : Sakham, 297  
 Govind : Savitri, 114  
 Govinda : Perumdevi, 856  
 Govinda Kur : Lala Kishun Prasad, 373  
 Govindasami : Ramaswamy, 838  
 Govindasami Naidu : Kuppasami Pillai, 355 356  
 Govindji : Lakmidas 78  
 Goyal Das Sidany : Luchmi Chand Jhwar, 780  
 G Rainey : Burma Fire & Marine Insurance Co., 225  
 Grafton : Armitage, 447  
 Graham v Campbell, 416  
 Graham : Krishna Chunder Das, 766, 775  
 Grant v Gold Exploration etc., Syndicate of British Columbia 606 605  
 Grant : Norway, 573, 662  
 Grant : Secretary of State for India, 643  
 Gravely : Barnard, 207  
 Gray : Gutteridge, 666  
 Gray : Haig, 604  
 Gray : Sockham, 498  
 Great Eastern, The, 571, 657  
 Great Indian Peninsular Ry Co : Chakravarti Sons & Co., 522  
 Great Indian Peninsular Ry Co v Jes Raj Patwari, 522  
 Great Indian Peninsular Railway : Jitan Ram, 522  
 Great Indian Peninsular Railway : Ram chandra Jagannath, 522  
 Great Northern Ry Co : Swaffield, 531  
 Great Northern Ry Co : Witham, 43  
 Great Western Insurance Co : Cunliffe, 611  
 Great Western Ry Co : Willis, 663  
 Greatrex : Greatrex, 710  
 Greaves : Parshotam, 723  
 Grubert Borgnis v Nugent, 420  
 Green : Bartlett, 616  
 Green v Briggs, 671  
 Green : Lucas, 616  
 Green : Mules, 615  
 Green : Wynn, 486  
 Greenwood : Francis, 491  
 Greenwood : Hornsey, 882  
 Grenon : Lachmi Narain Augurwalla, 311, 646  
 Grey : Mathias, 201  
 Grey : Lamond Walker, 688  
 Grice : Kenrick 645  
 Grindley : Barker, 559  
 Groom : Cheesewright, 622  
 Guaranty Trust Co of New York : Hannay & Co 840  
 Gubhov : Avetoom 641  
 Guerreiro : Pile 568  
 Guild & Co : Conrad 467  
 Gulabchand : Chunnial, 839  
 Gulabchand : Fulbari 191, 171, 172, 373  
 Gunn : Roberts 571  
 Gunput Narain Singh, *In re*, 790  
 Gurney : Womersley, 667  
 Gursami Chetty : Samurti Chinnu 238  
 Gurusami : Ganapathu, 772  
 Gurusami : Subbaraya, 176  
 Guthrie : Abool Mozuffer, 879

- Guthrie v Armstrong, 351  
Guy v Churchill, 173
- HADLEY v Baxen Isle, 412, 419, 420  
Hagedorn v Oliverson, 581  
Hajarimal v Krishnaray, 470, 488, 493  
Hajee Ismail & Sons v Wilson & Co., 407  
Haji Abdul Allarakhsa v Haji Abdul Bacha, 883  
Haji Abdul Rahman v Haji Noor Mahomed, 270, 273  
Haji Abdul Rahman Allarakhsa v The Bombay and Persia Steam Navigation Co., 179, 144, 827, 828  
Haji Hedayetulla v Mahomed Kamul, 717  
Haji Ismail v The Municipal Commissioner, 867  
Haji Ismail Sait v The Company of the Messageries Maritimes of France, 519  
Haji Mahomed Idr Spinner, 51, 55  
Haji Mahomed Mitha v Musaji Fesaji, 780, 810  
Haji Osman v Haroon Saleh Mahomed, 810  
Haji Rahimbux v Central Bank of India Ltd., 550, 553, 559  
Hakma Manji v Menan Ayab, 8, 448  
Halbot v Lens, 652  
Haldane v Johnson, 310  
Hale v Hale, 727, 728  
Halima Bee v Roshan Bee, 397  
Hall v Cap II, 189  
Hall v Hall, 727  
Hall v Warren, 81  
Hallett's Estate, *Re*, 346, 530  
Halliday v Holgate, 526  
Hambro v Burnand, 628, 656  
Hamburg, The, 572  
Hamidoolla v Faizunnissa, 161  
Hamilton v Watson, 502, 503  
Hamlyn v Houston & Co., 692  
Hamlyn & Co. v Talisker Distillery, 12, 170  
Hamlyn & Co. v Wood, 594  
Hammond & Co. v Bussey, 414, 421, 466, 506  
Hammonds v Barclay, 540  
Hampden v Walsh, 232, 233  
Hanmantrav v The Secretary of State for India, 831  
Hanna Ram v Jhanda Singh, 203  
Har Bhajan Lal v. Har Charan Lal, 56  
Har Chandi Lal v Sheoraj Singh, 293, 753  
Har Prasad Tiwari v Sheo Gobind Tiwari, 189  
Haradhan v Bhagabati, 798, 800  
Harburg India rubber Comb Co. v Martin, 467  
Harchand Singh v Gardip Singh, 705  
Hardeo Das v Ram Prasad, 241  
Harding *Ex parte*, 505  
Hardman v Booth, 555  
Hare and O More v Contract, *Per*, 592, 821  
Harindra Lal Roy v Uma Charan Ghosh, 756  
Hare v Naro, 185, 833  
Hari Lal Patil v Ramji Valad Pandu, 111, 444  
Hari Laxman v Secretary of State, 130  
Hari Mohan v Mohini Mohan, 74  
Hari Suran Maitra v Jotindra Mohan Lahiri, 301  
Hari Singh v Kuram Chand Kaush Ram, 704  
Haribhai v Nathubhai, 374  
Haribhai Mucklul v Sharafali Isabji, 211, 214, 217  
Harichand Mancharam v Govind Luxman Gokhale, 51  
Haridar Prasad Singh v Kesho Prasad Singh, 593  
Haridas Ranchordas v Mercantile Bank of India, 62  
Harilal Dilsukhram v Mulchand, 126, 134, 428  
Harilal v Nagar, 8  
Haripada v Anath Nath Dey, 544  
Harivallabhdas v Bhai Jivanji, 100, 176  
Harjas Rai Arjan Das, 170  
Harjibhai Das v Bhagwan Das, 479  
Harkisondas v Hariman, 342  
Harman v Johnson, 691  
Harmer v Cornelius, 603  
Harnath Kuar v Indar Bahadur Singh, 371, 374  
Harnamdas v Mayadas Lakhmichand, 679  
Harper v Godsell, 566  
Harrington v Victoria Dock Co., 665  
Harris v Nickerson, 57  
Harrison v Delhi & London Bank, 699.  
Harriss v Fawcett, 478

- Harry Meredith t Abdulla Sahib, 625  
 Hartas t Ribbons, 624  
 Hartley t Ponsonby, 195  
 Harvey v Johnston, 59  
 Hasha t Ragho, 725  
 Hashmat Ali v Lachmi Naram, 723  
 Hashmatmal t Pribdhas, 23  
 Haslam, *Re*, 610  
 Hasonbhoy t Clapham, 641, 652  
 Hastelow v Jackson, 592  
 Hathesing t Laing, 622  
 Hatzfeldt Wildenburg t Alexander, 51  
 Hawtayne v Bourne, 564, 574, 694  
 Hay v Goldsmidt, 566  
 Hayman, *Ex parte*, 684  
 Hazara Singh v Naranjan Singh, 294  
 Hazard t Tredwell, 657  
 Hazari t Chuanni Lal, 488, 496  
 Head, *Re* (No 1), 349, 690  
 Head, *Re* (No 2), 349, 690  
 Head v Diggon, 41  
 Heald t Kenworthy, 648  
 Heath v Chilton, 614  
 Heath t Sansom, 685, 720  
 Heatley t Newton, 638  
 Heera Lal t Dhunput Singh, 205  
 Heffield t Meadows, 474  
 Helme t Smith, 671  
 Hem Chandra De Sarkar t Amiyabala  
     De Sarkar, 817  
 Hem Raj t Khuda Bakhsh, 113  
 Hemchand t Govind, 375  
 Hemendro Coomar Mullick t Rajendro  
     lall Moonshee, 295  
 Henderson t Barnwell, 569, 575  
 Henderson v Stevenson, 34, 35  
 Henderson & Co t Williams, 534  
 Henkel t Pape, 84  
 Henthorn t Fraser, 39  
 Herman t Jeuchner, 372  
 Hermann t Charlesworth, 180  
 Hertford, Marquis of v Boore, 798  
 Het Naram t Ram Dens, 8  
 Het Ram v Debi Prasad, 469  
 Hickman t Berens, 136  
 Higgins t Senior, 636, 637  
 Hills t Croll, 795  
 Hilton t Pechersley, 218, 219  
 Hilton t Tucker, 543  
 Himatlal v Vasudev, 816, 817  
 Hinde v Liddell, 406  
 Hindley's Case, 48  
 Hine v S S Ins Syndicate, 565, 569  
 Hingam Lal t Mansa Ram, 379  
 Hipgrave t Case, 784  
 Hippisley t. Knee, 618  
 Hira t Bhandari, 181  
 Hira Lal Umrao v Singh Sri Ram Brij  
     Mohan Lal, 239  
 Hirabhai Manufacturer s Life Insurance  
     Co, 225  
 Hirachand v Temple, 362  
 Hirachand Amersey v Jayagopal Ganga  
     bushan, 699  
 Hirada Karibassappah t Gadiga Mud  
     dappa, 346  
 Hirji Khetsey & Co t B B & C I Rv  
     Co, 521  
 Hirji Melaram t Kirpi Ram Brij Lal,  
     726  
 Hoare t Parker, 555  
 Hobson t Bass, 471  
 Hochster v De la Tour, 287, 289  
 Hodges t D Ili & London Bank, 107, 591  
 Hogg t Scott, 883  
 Hogg t Smith, 566  
 Holding t Elliott, 637  
 Holland t Russell, 666  
 Hollis v Claridge, 620  
 Holme t Brunskill, 483, 484  
 Holme v Guppy, 319  
 Holme t Hammond, 674, 699  
 Holt t Ely, 679  
 Honapa t Narapa, 373  
 Honck t Muller, 314  
 Honda Mal t Muhammad Bakhsh, 438  
 Honeyman t Marryatt, 50  
 Hood t Anchor Lane, 34  
 Hooper t Kery, 346  
 Hope, The, 613  
 Horlock t Beal, 330  
 Hormasji t Mankuvarbhai, 633  
 Hormasji t Pestanji, 152  
 Hornby v Lacy, 558  
 Horne t Midland Ry Co, 420, 421  
 Horsfall t Thomas, 131  
 Hosein Shah t Nur Ahmed, 171  
 Hossainara t Rahimannessa, 277  
 Hoti Lal t Mussammat, 105  
 Hough t Manziros, 636, 641  
 Houghton v Matthews, 540, 568  
 Houldsworth v City of Glasgow Bank,  
     660  
 Houston's Case, 717  
 Household Fire etc, Insurance Co v  
     Grant, 33, 40

- H. V. J. & Co., 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892



- Ibsen v East and West India Dock Co., 423  
 Jcewanbai v Manordas, 8  
 Jefferys v Agra Bank, 539  
 Jenkins v Bethan, 603  
 Jenkins v Hutchinson, 635  
 Jennings v Jennings, 703  
 Jennings v Rundall, 70  
 Jessiram v Tulsidas, 239  
 Jessore Loan Co., Ltd., Regd. v Gopal Hari Ghose Choudhuri, 382  
 Jethibai v Puthibai, 204  
 Jhandoo Mal Jagan Nath v Phul Chand Fateh Chand, 288  
 Jhinguri v Durga, 157  
 Jhuna v Beni Ram, 837  
 Jiban Krishna Mullick v Nirupama Gupta, 19, 23  
 Jijibhai v Nagji, 371, 374  
 Jinnat Ali v Fateh Ali, 390, 397  
 Jivachand Gambhirmal v Laxminarayana, 243  
 Jivraj Meghji v Poulton, 316  
 Jivan Vurjung v Haji Osman, 266  
 Jiwana v Malak Chand, 181, 373  
 Joachinson v Meghjee Vallabhdas, 609  
 Jogendra Mohan Sen v Uma Nath Guha, 342  
 Jogendra Nath v Chandra Kumar, 130  
 Jogesh Chunder Dutt v Kali Churn Dutt, 404  
 Jognaram v Badri Das, 398  
 Jogu Mohen Deb v Davdoong Burman, 163  
 Johnson v Crowe, 125  
 Johnson v The Shrewsbury & Birmingham Ry. Co., 875  
 Johnston v Boyes, 56  
 Johnstone v Marks, 77  
 Johurmull Bhutra v Kedar Nath Bhutra, 568  
 Jones v Arthur, 276  
 Jones v Barkley, 314  
 Jones v Bowden, 118  
 Jones v Daniel, 50  
 Jones v Gardiner, 427  
 Jones v Gordon, 551  
 Jones v Littledale, 635  
 Jones v Marshall, 646  
 Jones v Merionethshire Building Society, 93, 169  
 Jones v Peppercorn, 620  
 Jones v St John's College, 458  
 Jones v Williams, 748  
 Jonmenjoy Coondoo v Watson, 551, 565  
 Joravai Mell Champalal v Jeygopaladas Ghanshyandas, 43  
 Joravermal Siria v Dadabhai Beramji, 241, 242  
 Jordon v Ram Chandra Gupta, 617  
 Joseph v Calcutta Corporation, 847, 849  
 Joseph v Solano, 188  
 Joshi Kalidas v Koli Dada, 458  
 Jowala Nath v Rupa, 303  
 Joy Chunder v Bipro Churn, 878  
 Joy Lal & Co. v Monmotha Nath, 638  
 Joykisto v Nityanund, 688  
 Joyma Bewa v Easin Sirkar, 468  
 Joyner v Weeks, 423, 429  
 Judah v Emperor, 536  
 Jugal Kishore v Chari & Co., 364  
 Jugdeo Narain Singh v Rajah Singh, 403  
 Juggewundas v Ramdas, 698  
 Juggernauth Sew Bux v Ram Dyal, 241, 246, 273  
 Juggessur v Panchcowree, 181  
 Juggomohun Ghose v Kaisreechund, 63  
 Juggomohun Ghose v Manickchand, 11, 63  
 Juggut Chunder v Rada Nath, 708, 725  
 Jukni v Queen Empress, 161  
 Jwala v Ganga Prasad, 753  
 Jwala Prasad v Hoti Lal, 431  
 Jwaladutt R. Pillai v Bansilal Motilal, 723  
 Jyani Begam v Umras Begam, 397  
 Jyoti Prakash v Mukti Prakash, 546  
 Jyoti Kumar v Hari Das, 159  
 Jyoti Prakash v Mukti Prakash, 543, 546  
 KADIRESAN CHETTIAR v Ramanathan Chetti, 584  
 Kahan Chanddula Ram v Daya Ram Amrit Lal, 202  
 Kahn v Ali Mahomed, 728  
 Kalabhai v The Secretary of State for India, 852  
 Kalachand Kyal v Shib Chunder, 438, 442, 443  
 Kailash Chandra Dutt v Jogesh Chandra Majumdar, 843

- Isherwood v Whitmore, 275  
 Ishur Chunder v Jibun Kumari 513  
 Ishvar v Dewar, 835  
 Ishwari Singh v Naram Dat, 854  
 Ismail Allarakhia v Dattatraya, 138  
 Ismail Ariff v Mahomed Ghous, 752, 754, 851  
 Israr Hasan Khan v Deo Narain, 707  
 Ismail Hasan v Mehdi Hasan, 431  
 Ismail Mussajee v Hafiz Boo, 101, 107  
 Ismal v Daudbhai, 253  
 Ismailji v Raghunath, 152  
 Isri Dutt Koer v Hansbutti, 858  
 Issufalli Hassanaky v Ibrahim Dajibhai, 514  
 Iswaram Pillai v Sonnivevaru, 22  
 Ivesson v Conington 636  
 Iyyappa v Ramalakshamma, 836
- J H Tod v Lakhmidas See Tod, J H v Lakhmidas  
 Jackson v Cummins, 537  
 Jackson v Turnley, 858  
 Jacobs v Latour, 622  
 Jacobs v Morris, 566, 658  
 Jadobram v Bulloram 765  
 Jadu Nath Poddar v Rup Lal Poddar, 373  
 Jafer Ali v Ahmed Ali, 198  
 Jafferah Bhaloo Lakha v Standard Bank of S Africa, 687, 699  
 Jaffer Meher Ali v Budge Budge Jute Mills Co, 146, 157, 265, 266, 268  
 Jafferbhoy v Charlesworth, 540, 591  
 Jafferbhoy Abdullahoy v Mahomedally, 863  
 Jag Lal v Shib Lal, 299  
 Jagabhai v Rustamji, 591  
 Jagadindra Nath v Chandra Nath, 192  
 Jagai Chandra Bhattacharjee v Gunny Hajee Ahmed, 710, 723  
 Jagannadham v Raganadha, 438  
 Jagannadha Rao v Somi Lakshminarayana, 815  
 Jagannath v Jhunna, 342  
 Jagannath v Secretary of State, 89  
 Jagannath v Vishnu, 436  
 Jagannath Girdhar v Targuna Nand, 854  
 Jagannatha v Rama Rayer, 751  
 Jagannathdas v Ramdas 567, 568  
 Jagapati v Lakshmana 568  
 Jagapatiraju v Sidrusannama Arad 390, 397
- Jagardeo v Phuljhar, 838  
 Jagar Nath Singh v Lalit Prasad, 70, 73  
 Jagat Chunder v Iswar Chunder, 711  
 Jagat Narain v Sri Kishan Das, 241  
 Jagat Tarini v Naba Gopal, 277  
 Jagaveera Rama Ettappa v Arumugam, 193  
 Jaggannath v Secretary of State, 89  
 Jaghomundis v Nusserwanji, 409  
 Jagon Ram v Mahadeo Prasad, 77  
 Jai Gopal v Lalit Mohan, 837  
 Jai Kisnen Das v Aiyia Priti Nidhi Sabha, 428  
 Jai Kumar v Gauri Nath, 172  
 Jai Narain v Mahabir Prasad, 80  
 Jaikissondas v Zenabai, 728  
 Jajadhar v Jacannath, 200  
 Jalim Singh v Secretary of State, 520  
 Jamal v Moolla Dawood, Sons & Co, 405, 406, 422, 424, 431  
 Jamal Singh v Ghulam Mahommed, 799  
 Jambu Ramaswamy v Sundararaja, 489  
 Jamna Bai v Vasanta Rao, 78, 295  
 Jamna Das v Ram Autar, 21  
 Jampadas v Atmaram, 882, 883  
 Jamsetji v Hirjibhai 127, 348  
 Jamshed v Burjorji 324, 780  
 Janaki Ammal v Narayanasami 779, 857  
 Jan and Son v Cameron, 521  
 Jang Bahadur v Shankar Rai, 567  
 Jangul Singh v Ghulam Mahomed 799  
 Janki Das v Ahmad Husain, 444  
 Janli Das Gobind Ram v Secretary of State for India, 522  
 Janki Prasad v Kishen Dutt, 817  
 Janki Prasad Singh v Baldeo Prasad, 385, 398  
 Janson v Driefontein Consolidated Mines, 167, 168  
 Jaques v Millar, 415, 426  
 Jarao Kumari v Bivanta Kumar Roy, 393, 396  
 Jarini Mohun v Gunga Prasad 751  
 Jasraj Bistimal v Sidashiv Mahadev, 72.  
 Jaunpur Sugar Factory, *In re* 258  
 Javalu Ramasami v Sithambalam 725  
 Javerlhai v Gordhan, 374  
 Jawahir Singh v Secretary of State, 285  
 Jawan Singh v Muhammad Din, 878

- Jacobsen v East and West India Dock Co., 423  
 Jeewanbai v Manordas, 8  
 Jefferys v Agra Bank, 539  
 Jenkins v Bethan, 603  
 Jenkins v Hutchinson, 635  
 Jennings v Jennings, 703  
 Jennings v Rundall, 70  
 Jessiram v Tulsidas, 239  
 Jessore Loan Co., Ltd., Regd. v Gopal Hari Ghose Choudhuri, 382  
 Jethibai v Putlibai, 204  
 Jhandoo Mal v Jagan Nath v Phul Chand Fateh Chand, 288  
 Jhinguri v Durga, 157  
 Jhuna v Beni Ram, 837  
 Jiban Krishna Mullick v Nirupama Gupta, 19, 23  
 Jijibhai v Nagji, 371, 374  
 Jinnat Ali v Fateh Ali, 390, 397  
 Jivachand Gambhirmal v Laxminarayana, 243  
 Jivraj Meghji v Poulton, 316  
 Jiwan Vurjung v Haji Osman, 266  
 Jiwana v Malak Chand, 181, 373  
 Joachinson v Meghjee Vallabhdas, 609  
 Jogendra Mohan Sen v Uma Nath Guha, 342  
 Jogendra Nath v Chandra Kumar, 130  
 Jogesh Chunder Dutt v Kali Churn Dutt, 404  
 Jognarain v Badri Das, 398  
 Jogu Mohen Deb v Davdoong Burman, 163  
 Johnson v Crowe, 125  
 Johnson v The Shrewsbury & Birmingham Ry. Co., 875  
 Johnston v Boyes, 56  
 Johnstone v Marks, 77  
 Johrmull Bhutra v Kedar Nath Bhutra, 568  
 Jones v Arthur, 276  
 Jones v Barkley, 314  
 Jones v Bowden, 118  
 Jones v Daniel, 50  
 Jones v Gardiner, 427  
 Jones v Gordon, 551  
 Jones v Littledale, 635  
 Jones v Marshall, 646  
 Jones v Merionethshire Building Society, 93, 169  
 Jones v Peppercorn, 620  
 Jones v St. John's College, 458  
 Jones v Williams, 748  
 Jonmenjoy Coondoo v Watson, 551, 565  
 Jorival Mell Champalal v Jeygopaladas Ghanshandas, 43  
 Joravermal Sivila v Dadabhai Beramji, 241, 242  
 Jordon v Ram Chandra Gupta, 617  
 Joseph v Calcutta Corporation, 847, 849  
 Joseph v Solano, 188  
 Joshi Kalidas v Koli Dada, 458  
 Jowala Nath v Rupa, 303  
 Joy Chunder v Bipro Churn, 878  
 Joy Lal & Co. v Monmotha Nath, 638  
 Joykisto v Nittyanund, 688  
 Joyma Bewa v Easin Sarkar, 468  
 Joyner v Weeks, 423, 429  
 Judah v Emperor, 536  
 Jugul Kashore v Chari & Co., 364  
 Jugdeo Narain Singh v Rajah Singh, 403  
 Juggewundas v Ramdas, 693  
 Juggernauth Sew Bux v Ram Dyal, 241, 246, 273  
 Juggessur v Panchcowree, 181  
 Juggomohun Ghose v Kaisreechund, 63  
 Juggomohun Ghose v Manickchand, 11, 63  
 Juggut Chunder v Rada Nath, 708, 725  
 Jukni v Queen Empress, 161  
 Jwala v Ganga Prasad, 753  
 Jwala Prasad v Hoti Lal, 431  
 Jwaladutt R. Pillani v Bansilal Motilal, 723  
 Jyani Begam v Umras Begam, 397  
 Jyoti Prakash v Mukti Prakash, 546  
 Jyoti Kumar v Hari Das, 169  
 Jyoti Prakash v Mukti Prakash, 543, 546  
 KADIRESAN CHETTIAR v Ramanathan Chetti, 584  
 Kahan Chanddula Ram v Daya Ram Amrit Lal, 202  
 Kahn v Ali Mahomed, 728  
 Kalabhai v The Secretary of State for India, 852  
 Kalichand Kyal v Shib Chunder, 438, 442, 443  
 Kailash Chandra Dutt v Jogesh Chandra Majumdar, 843

- Marriott : East Grinstead Gas & Water Co, 883
- Marsh : Jelf, 570
- Marsh : Joseph, 585
- Marsh v Keating, 692
- Marshall & Co v Naginchand, 327
- Marshall : Berridge, 415
- Martyn v Gray, 684
- Marudamuthu : Rangasami, 153
- Ma Sein v P L S K Firm, 854
- Mashal Singh : Ahmad Husain, 753
- Masjudi : Mussammat Ayisha, 93, 102
- Mason, *Re*, 622
- Master : Miller, 354
- Masulipatam, Collector of : Cavalry Vencata, 583
- Mather, *Ex parte*, 626
- Mathra Das v Nizam Din, 279
- Mathra Das Jagan Nath : Jiwan Mal Gian Chand, 607
- Mathra Das Mustaddi Lal : Kishen Chand Ramji Das, 599
- Mathura Mohan Saha : Ram Kumar Saha, 376
- Mathura Nath v Sreejukti Bageswari, 696
- Mathuradas : Ebrahim Fazalbhoy, 306
- Mathuradas : Narbaddshankar, 238
- Matthews v Munster, 567
- Maughan : Sharpe, 676
- Maup Ram : Tara Singh, 583
- Maung Ni v Maung Aung Ba, 760
- Maung Pe Gyi : Hakim Ally, 827
- Maung Po Hwee : Maung Aung Mya, 250
- Maung Pu : Maung Po Thant, 363, 364
- Maung Pu Lwin : Maung Sein Hau, 817
- Maung Sein Htin : Chek Pan Ngaw, 185
- Maung Wali : Maung Shwe Gon, 324
- Maung Ye v M A S Firm, 150
- Maunsell : Hedges, 61
- May : Harvey, 532
- Maya Ram : Naubat, 448
- Maya Ram : Prag Dat, 765
- Mayer : Alston, 610
- Mayhew : Crickett, 499
- Mavor of Durham : Fowler, 495
- Mayer & L & S W Ry, 556
- Melin : The, 571
- Meekshundari : Vetrappa, 315
- Meek : Wendt, 653
- Meenakshi Sundara : Rathnasami, 789
- Meghji : Jadhawji, 234
- Meghraj : Ganga Bakhsh, 112
- Meghraj : Hargayan, 112
- Meherally v Sakerkhannobai, 160, 340
- Meherullu v Sariatulla, 63
- Mehr Chand v Jugal Kishore Gulab Singh, 406
- Mehr Singh : Chela Ram, 304
- Mehta : Cassumbhai, 617
- Mercantile Bank of India : Rochaldas Gidumal, 538
- Meredith (Harry) : Abdulla Sahib, 625
- Meredith : Footner, 663
- Merryweather : Nixan, 391
- Mersey Steel and Iron Co : Naylor, Benzon & Co, 232, 314
- Merwanji : Rustomji, 729
- Mesha Ahronel : The National Bank of India, 355
- Metcalf : Bruin, 716
- Metropolitan Bank : Heiron, 609
- Metropolitan Electric Supply : Ginder, 869, 887
- Metropolitan Water Board : Dick Kerr & Co, 331
- Mews : Carr, 570
- Meyer : Dresser, 11
- Meyer & Co : Faber, 676
- Meyyappa Chetty : Nachammal Achu, 433
- Majan Patari : Abdul Juhhar, 451
- Michael : Briggs, 640
- Michael : Hart & Co, 412
- Mildred : Maspons, 621
- Miles : New Zealand Alford Estate Co., 29, 193
- Miles : Thomas, 873
- Miller : Nasmyth's Patent Press Co., Ltd., 537, 541
- Miller, Gibb & Co : Smith & Tyren, 689
- Millett : Van Heck & Co, 290, 422
- Mills : Dunham, 214
- Millward : Littlewood, 160
- Mir Hazar Khan : Siwan Ali, 455
- Mir Sarwarjan : Iakhruddin Mahomed, 66, 76, 791
- Mirza Ali : Rameshar, 679
- Mirza Sajjad Hussain : Nawab Wazir Ali Khan, 105
- Misra : Currie, 539, 620
- Misra Lal : Khairul Lal, 819
- Mitchell : Homfray, 97
- Mitchell : Lapage, 81



- Moung Tha Huiy : Mah Them Myah, 709
- Mountstephen : Lakeman, 467
- Mowbray v. Merryweather, 415
- Moyan v Pathukutti, 224
- Muhammad Abdulla : Bank Instalment Co., Ltd, 205
- Muhammad Alam : Akbar Husain, 850
- Muhammad Ali Akbar : Fatima Begum, 160
- Muhammad Askari : Radhe Ram Singh, 295, 296, 297, 298, 299
- Muhammad Habid Ullah : Bird & Co., 323, 325
- Muhammad Habid ul Ralman : Sheo-nandan Singh, 383
- Muhammad Hashim : Misri, 374
- Muhammad Ibrahim : Umatullah Jan, 106
- Muhammad Ismail Khan : Saad un din Khan, 299, 300
- Muhammad Jan v Fazal ud din, 231
- Muhammad Munud din : Jamal Fatima, 160
- Muhammad Sadik Khan : Masihan Bibi, 817
- Muhammad Said : Bishambhar Nath, 70
- Muhammad Salim v Ramkumar Singh, 844
- Muhammad Shah v Sarsuti, 348
- Muhammad Ubed Ullah : Muhammad Insha Allah Khan, 478
- Mujid un Nissa v Abdur Rahim, 588
- Mukal Nath : Shyam Sunder Lal, 398
- Mul Chand Shub Dhan : Sheo Mal Sheo Parshad, 618
- Mul Singh v Krishan Gopal, 444
- Mulchand : Tarachand, 670
- Mulibai : Shewaram Menghraj, 303
- Mulji Tejsing : Ransi Devraj, 221
- Mulk Raj : George Knight, 305
- Mullens : Miller, 565
- Mullings : Trinder, 809
- Munia : Perumal, 74
- Municipal Corporation of Bombay : Caverji Hirji, 616
- Municipal Council, Kumbakonam : Abbah Sahib, 157
- Munisami Mudali : Perumal Mudali, 313
- Munna Singh : Ausun Singh, 750
- Munna Bibu : Kunwar Kamta Singh, 782
- Munna Koer : Madan Gopal, 74
- Munshi Amir Ali : Maharani Inderjit Koer, 223
- Munshi Basiruddin Mullick : Surja Kumar Naik, 691.
- Munuswami Niyudu v Sagalaguna Nayudu, 785
- Muridhar : Bhikhi, 398
- Murray : East India Co., 566
- Murray : Mann, 615
- Murrell : Goodyear, 778
- Murugappa Mudaliar : Munusami Mudali, 486
- Murugesu : Jotharam, 756
- Musammatt Kundan Bibi : Sree Narayan, 201
- Mussammatt Ram Kaur : Raghbir Singh, 666
- Mussammatt Roshun : Muhammad, 164, 165, 188, 373
- Mussammatt Chamma, *In re*, 161
- Muthayamananigaran : Lakku Reddian, 407
- Muthayya Chetti : Narayanan Chetti, 394
- Muthiah Chettiar : Govindoss Krishna doss, 223
- Muthiar Chettiar : Karuppan Chetti, 95
- Muthu Raman : Chinna Vellayan, (or Vallayan), 394, 468, 507
- Muthukaruppa : Kathippudayan, 469
- Muthura Persad : Luggun Kooer, 438
- Muthurakku : Rakkappa, 383
- Muthuraman Chetty : Krishna Pillai, 373
- Muthuswami Kavundan : Ponnayya Kavundan, 383
- Muthuvarappa : Ramaswami, 171, 404
- Mutsaddi Lal Sewa Ram : Bhagirth, 241
- Muttakke : Thimmappa, 854
- Mutthaya Maniagaran : Lekku, 326, 365
- Mutty Lal Ghose, *In the matter of*, 865
- Mutukrishna : Sankara Lingam, 451
- Mycock : Beatson, 712
- Mylappa Chettiar : Agri Mirza Mohamed, Shirazee, 15
- Mylappa Chettiar : The B I S N Co., Ltd, 519
- Myer : Itzpatrick, 676
- N. M. Iyer : Theperumal Chetty, 340
- Nabin Chandra Sarma : Rajani Chandra, 263

- Nabinchandra v Krishna, 409, 428  
 Nabo Kumar t Syed Abdul, 451  
 Nadershaw t Shirinbai, 271  
 Nadimulla v Channappa, 348  
 Naganada v Bappu, 550  
 Nagappa Pillai v Arunachalam Chetty, 373  
 Nagardas v Ahmedkhan, 427, 428  
 Nagendra Nath Roy v Jugul Kishore Roy, 383, 387  
 Nagendra Nath Singha v Nagendra Bala Chowdhurani, 603  
 Nagendrabala t Guru Doyal, 615  
 Nagia v Venkatarama, 771  
 Nait Ram v Shib Dat, 436, 455  
 Najaf Ali Khan v Muhammad Fazal Ali Khan, 441, 453  
 Nalan Padmanabham v Sait Badrinadh, 153  
 Nallappa v Vridhachala, 465  
 Namasivaya Gurukkal t Kadir Ammal, 265  
 Namasivayam v Nellayappa, 816  
 Nanak Chand v Durrant, 172  
 Nanak Ram v Mehm Lal, 469  
 Nanbat Rai v Dhaunkal Singh, 816  
 Nand Kishore v Parao Mian, 388  
 Nanda Lal Roy t Gurupada Halder, 642, 655  
 Nanda Singh v Sunder Singh, 163  
 Nandan Missir t Lala Harakh Narain, 342  
 Nanjappa v Nanjappa, 438, 439, 442, 443  
 Nanjunda Swami Chetti v Kanagaraju, 17  
 Nanku Ram v Indian Midland Ry Co., 521  
 Nannier v Rayalu Iyer 284  
 Nant v glo Iron Co v Grave 609  
 Naoroji t Kazi Sidick Mirza 156, 206 362  
 Naoroji t Rogers, 2  
 Narain v Aukhoy, 813  
 Narain v E I Ry Co., 520  
 Narain Das v Chait Ram 438  
 Narain Das t Het Singh 750  
 Narain Das v Musummat Dhanu 74  
 Narain Das t Nenu 488  
 Narain Das v Ralli Brothers 688  
 Narain Mitter t Kishen Soondory Dassee, 847  
 Narain Singh t Chiranj Lal 71, 75  
 Narain Singh t Mata Prasad Singh 469  
 Narasimba Mudali t Narayanaswami Chetty, 284  
 Narasimhalu Naidu v Naina Pillai, 172  
 Narasimma t Anantha Bhatta, 184  
 Narayan v Ganesh, 500  
 Narayan t Laving Bharthi, 161  
 Narayan t Raoji, 143  
 Narayan Coomari Debi t Shajani Kanta Chatterjee, 162, 195 612  
 Narayan Row v Dharmachar, 753  
 Narayan Undir Patil t Motilal Rainsda\*, 228  
 Narayana v Shankunni, 852, 854  
 Narayana Ayyangar t Vellachami Am balam, 252  
 Narayana Chetti v Lakshmana Chetti, 298  
 Narayana Duss Balakrishna t Buchray Chordia Sowcar, 103, 104  
 Narayanasami t Lokanibalammal, 16  
 Narayanasami Naidu v Narayana Rau, 442  
 Narayansami t Osuru Reddi 403  
 Narayen v Gopalrao 160  
 Narbadashankar t Mathuradas, 238  
 Nardan Prasad v Adjudhia Prasad, 382  
 Narotum v Nanka, 78  
 Nash t Inman, 77  
 Nasir Khan v Tara Chand, 813  
 Natabar v Kubar, 752  
 Natesa Iyer t Appava, 365, 368, 781  
 Natesan, *In the matter of*, 863, 865  
 Nath Prasad t Baij Nath, 385 398  
 Nathabhai v Ranchodlal 488  
 Nathu t Balwantrao 394  
 Nathu Khan t Sewak Koori, 371  
 Nathu Ram v Dogar Male, 353  
 Nathubhai t Javher, 78 562  
 Nathubhai v Mulchand, 8  
 Nathuni Sahu t Baijnath Prasad 454  
 National Bolivian Navigation Co t Wilson, 657  
 National Coal Co t Kshitish Bose & Co., 490  
 Naubahar Singh t Qadir Bux, 844  
 Navakotti Narayana Chetti v Lagalinga Chetti 74  
 Nawab Begam v Creet 798  
 Nawab Mir Kamaludin t Partap Mota, 389  
 Nawlor, Benzon & Co v Kramische Industrie Gesellschaft, 169

- Nazaralli v. Babamya, 132.  
 Neale v. Gordon Lennox, 548.  
 Neale v. Mackenzie, 844.  
 Neckram v. Bank of Bengal, 543, 547.  
 Neil Comul Mookerjee v. E. pro Duss, 717.  
 Neerhi v. Jadhavji, 228.  
 Nehal Singh v. Fateh Chandel, 24.  
 Nelson v. James, 666.  
 Nelson v. Alford, 570.  
 Nenu Chand v. Balu Kichen, 345.  
 Nensukdas v. Bird's hand, 577, 679.  
 Neti Rama v. Venkatascharala, 836.  
 Nevill, *Re*, *Ex parte* White, 350.  
 New v. Swan, 493.  
 New Beerbhoom Coal Co., Ltd. v. Roderam Mahata, 791.  
 New Zealand Land Australian Land Co. v. Watson, 377.  
 New Zealand Co. v. Société des Ateliers et Chantiers de France, 234.  
 Newall v. Tomlinson, 666, 667.  
 Nichol's & Von Joel's Contract, 807.  
 Nicholson, *Re*, 622.  
 Nicholson v. Chapman, 323.  
 Nicholson v. Harper, 528.  
 Nicholson v. Raketta, 699.  
 Nikila v. Hameek, 824.  
 Nihal Chand v. Amar Nath, 49.  
 Nihal Singh v. The Collector of Bulandshahr, 502.  
 Nihalsingh Mahtarsingh v. Vishnu Govardhindra, 710.  
 Nilmony Singh v. Kally Churn, 812, 818.  
 Nilu Chand v. Jagdishdas, 503.  
 Nirosh v. Jakaria, 300, 307.  
 Niss Chand v. Kanchiram, 751.  
 Nisar Ahmad Khan v. Rahmat Begum, 190.  
 Nissim Isaac v. Haji Sultanali, 337.  
 Nittala Tacadatiklakrik v. Bruster, 618.  
 Nobin Chunder v. Ramesh Chunder, 8.  
 Nobin Krishna Bose v. Mon Mohun Bose, 394.  
 Noor Mahomed Lallam v. Phandray, 483.  
 Noorthal v. Allalux, 63.  
 Nordenfalk v. Maxim Nordenfalk Co., 210, 219.  
 Norton v. Wright, 314, 324.  
 North British Insurance Co. v. Lloyd, 601, 604.  
 North Western Bank v. Poter, Son & Madanlal, 514, 612.  
 North Western Provinces Club v. Sadul-lah, 641.  
 Norton v. Horton, 631.  
 Nottingham Building Society v. Thurston, 373.  
 Nottingham, Hyde & Co. v. Bottrill, 474.  
 Nowell v. Nowell, 703.  
 Nowto Lal v. Rajendra Narain Deb, 751.  
 Nukula Venkatarandam v. Immadisetty Phandraya, 154.  
 Nura's Kishore Lal v. Must Ram-singh Koor, 351.  
 Nura's Lal v. Niswami, 567, 568.  
 Nur Ali Dabach v. Abdul Ali, 212, 214.  
 Nursery Spinning and Weaving Co., *Re*, 124, 130.  
 Nursing Dass Kothari v. Chuttoo Lal Muser, 131.  
 Nussurwanjee v. Gordon, 875.  
 Nyberg v. Handelslist, 526, 555.  
 Oakes & Co. v. Jackson, 211, 212, 219.  
 Oakley v. Pasheller, 479.  
 Oates v. Hudson, 667.  
 Oble K. Subbar v. Venkataschalapathi Ayyar, 281.  
 Oceanic Steam Navigation Co. v. Soondardis Dhurumser, 124.  
 Okenden v. Healy, 782.  
 Oleson, The, 339.  
 Odessa Tramways Co. v. Mendel, 665.  
 Official Assignee v. R. M. P. V. M. Firm, 608.  
 Official Assignee of Madras Palayam, 539, 678, 688.  
 Offord v. Davies, 41, 476.  
 Ogden v. Hall, 637, 640.  
 Ogden v. Ogden, 12.  
 Ogle v. Vane, Earl of, 407.  
 O'Hanlin v. G. W. R. Co., 407.  
 Olati Pulliah Chetty v. Varadarajulu, 193.  
 Oliver v. Oliver, 755.  
 Oliver v. Fisher, 830.  
 Om Parkash Mitter v. Haji Abdul Rahim, 201.  
 Omda Khanum v. Brojendro, 13.  
 Onkar Mal v. Ashu Ali, 170.  
 Omsand, The, 572.  
 Osm v. Bruce, 678.  
 Oriental Bank Corporation v. Fleming, 86, 87, 121.  
 Oriental Financial Corporation v. Over-en, Gurney & Co., 492.

- Oriental Government Security Life Ass  
 Co., Ltd v Narasimha Chari, 35, 370  
 O'Rourke v Blingbroke, 107  
 Oscanyan v Wiedester, 185  
 Osman Jinnal & Sons, Ltd v Gopal  
 Purshattam, 463, 464  
 Oswald v Mayor of Berwick, 450  
 Overend v Gibb, 603  
 Overend, Gurney & Co v Oriental  
 Financial Corporation, 479, 480  
 Owen v Cronk, 666  
 Owen & Co v Cronk, 579  
 Oxford v Provan, 321, 796, 801  
  
 P. C. PAL v K. A. L. R. Firm, 479, 481  
 Padget v Priest, 667  
 Page v Cox, 23  
 Page v Newman, 431  
 Paine v Walker, 637  
 Paine v Weller, 765  
 Palaniappa Chettiar v Chockalingam  
 Chettiar, 615  
 Palepu Narayanaswamy v Mallapuli  
 Subrahmanyan, 152  
 Palmer v Hutchinson, 613  
 Palmer v Locke, 809  
 Palmer v Wick, etc., Steamship Co. 301  
 Panchikore v Hari Das 388, 397, 398  
 Pandurang v Dilabhai, 272  
 Pankhabai v Nani Lal, 383, 386  
 Panmure, *Ex parte*, 651  
 Panna Singh v Arjam Singh, 435, 451  
 Pannichand v Nanoo Sanker, 164  
 Pape v Westacott, 565  
 Paquin v Beauclerk, 563  
 Parakh Govardhanbhai Haribhai v  
 Ransordas Dulabhdhas, 211, 242  
 Paramma v Ramachandra, 356  
 Parana, The, 410  
 Parangodan v Perumtodka 782  
 Parasullah v Chandra Kant, 219  
 Parbhu v Puttu, 104  
 Parbhu Ram v Jhalo Kuer, 279, 326  
 Parbhudas Pranjivandas v Ramlal Bha  
 girath, 315  
 Parchim, The, 471  
 Pardhan Bhukhan Lal v Narsing Dyal,  
 440, 441, 442  
 Paris Chocolate Co v Crystal Palace Co.,  
 788  
 Park v Hammond, 603  
 Parker, *Re*, 626  
 Parker v Ibbetson, 616  
  
 Parker v Lewis, 465  
 Parker v McKenna, 609  
 Parker v S. F. Ry. Co., 31  
 Parker v Wallis, 516  
 Parker v Winlow, 637  
 Parkins v Hawkshaw, 663  
 Parma Nand v Ghulam Hussain Shah,  
 429  
 Parvatibai v Vishvanath Ganesh, 834  
 Pater v Gordon, 641.  
 Paterson v Ganjasequi, 651.  
 Pathak Kali Charan v Ram Dini Ram,  
 382  
 Patiram v Kankanasrah Co., Ltd.,  
 612  
 Patrick v Russo British Grain Export  
 Co., 413  
 Pattinson v Luckley, 354  
 Pattinson v Gifford, 879  
 Paul v Robinson, 877  
 Paul Beier v Chotalal Javerdas, 65, 558,  
 599  
 Pava v Govind 448, 450  
 Pavanga v Govind, 8  
 Payda Ramakrishnavya v Barrey Na  
 garazu 391  
 Payne, *Re*, 673  
 Payne v Cave, 42  
 Payne v Hornby, 719  
 Payne v Leconfield, 570  
 Peacock v Bajnath, 540, 577  
 Peacock v Benson, 795  
 Pearce v Brooks 147, 161  
 Pearl v Deacon, 499, 500  
 Pearl Mill Co v Ivy Tannery, 317,  
 325  
 Pearson v Goschen, 573  
 Pearson v Scott 565, 614  
 Pearson v Case, 609  
 Peck v Gurney, 122  
 Peer Mahomed v Mahomed Ebrahim,  
 798  
 Pemraj v Narayan 754  
 Pennington v Reliance Motor Works,  
 637  
 Penumasta Subbaraju v Indukuri Nara  
 yanaraju, 160  
 Pepin v Chunder Seekur Mookerjee,  
 465  
 Peria Sami v Representatives of Salugar,  
 136.  
 Periamanna Marakkayar v Banians, 467,  
 507

- Periasami Thalavar v Subramanian  
     Asari, 438  
 Perosha v Manekji, 234, 236, 242, 243,  
     245, 246, 247, 250  
 Perry v Barnett, 624  
 Perry v Clissold, 748  
 Perry v Liverpool Malt Co, 227  
 Perry v National Prov Bank of England,  
     348, 487  
 Perry v Suffields, Ltd, 51  
 Perry v Truefitt, 885  
 Pertab Singh v The Secretary of State,  
     401  
 Pertap Chunder v Mohendranath Park  
     hai, 125  
 Perundevitayar v Nammalvar, 513  
 Pestonji v Matchett, 591  
 Pestonji v Bai Meherbai, 203, 468  
 Pestonji v Gool Mahomed, 561  
 Petch v Lyon, 663  
 Petherpermal v Muniamdi Servai, 372,  
     373  
 Petty v Cooke, 489  
 Phalli v Matabadal, 157  
 Phalram v Ayub Khan, 382  
 Phillips v Alhambra Palace Co, 292  
 Phillips v Brooks, 89  
 Phillips v Foxall, 475, 495  
 Philippotts v Evans, 287  
 Phul Chand v Chand Mal, 790  
 Phul Chand Fatch Chand v Jugal  
     Kishore Gulab Singh, 284  
 Piar (or Pyaro) Lal v Mina Lal, 460  
 Pichakutty Mudali v Narayanappa, 166  
 Pickering v Busk, 606  
 Pickering v Ilfracombe Ry Co, 187  
 Pickernell v Jauberry, 573  
 Pidecock v Bishop, 502  
 Pidding v How, 885  
 Pigot v Cubley, 546  
 Pike v Ongley, 637  
 Pillai v Ramalinga Pillai, 162  
 Pinet & Cie v Maison Louis Pinet, 677  
 Pini v Roncoroni, 727  
 Pirtha Das v Hira Singh, 373  
 Pirthi Mal v Gopi Nath, 544  
 Pirthi Mal v Mussammat Bhagan, 164  
 Pitamber v Cassibai, 427  
 Pitamber v Jagjivan, 183  
 Iledge v Buss, 499  
 Pozoso v Bank of Bengal, 480, 495  
 Polak v Everett, 482, 485, 500  
 Pole v Leask, 601  
 Poma Dongra v William Gillespie, 112,  
     133  
 Ponnammal v Pichai Thevan, 366  
 Ponnusami v Nadimuthu, 112, 453  
 Pooley v Driver, 669, 680  
 Poonoo Bibee v Fyez Buksh, 190, 198,  
     340  
 Poosathurai v Kannappa Chettiar, 96,  
     112  
 Poraka v Vadlamudi, 772  
 Porter v Freudenberg, 168  
 Porter v Incell, 680, 683  
 Pothi Ram v Islam Fatima, 216  
 Potter v Sanders, 814  
 Potts v Bell, 168  
 Poussard v Spiers & Pond, 328  
 Pow v Davis, 654  
 Powell v Brodhurst, 277, 279, 697  
 Powell v Jones, 576, 608  
 Power v Butcher, 628  
 Powles v Paye, 633  
 Prabhu Mal Ghula Mal v Babu Ram  
     Bashesar Das, 372  
 Prag v Sital, 158  
 Prager v Blatspiel, 574  
 Pragi v Pranjiwan, 213  
 Prahlad Prasad v Bhagwan Das, 203  
 Pramala Basi Das v Jogeshar Mandal, 74,  
 Pramatha Nath v Dwarkanath, 353  
 Pratt v Brett, 873  
 Pratt v Vizard, 620  
 Prayag v Shyam Lal, 450  
 Prem Narain Singh v Parasram Singh,  
     111  
 Prem Sook v Dhurum Chand, 216  
 Premabhai v Brown, 630  
 Prematha Nath v Dwarkanath, 353  
 Premji v Dossa, 697  
 Premji v Madhowni, 647.  
 Preonath v Ashutosh, 817  
 President of the Taluk Board, Kundapur  
     v Burde Lakshminarayana Kamphui,  
     459  
 Prestwich v Poley, 568  
 Price v Dyer, 812  
 Prickett v Budger, 594, 617  
 Priestly v Fernie, 650  
 Pringle v Jafar Khan, 241, 242  
 Profulla Kumar Bose v Nabo Kishore  
     Rai, 550  
 Prokash Chandra v Allam, 162  
 Promothonath Mittra v Gostha Behar  
     Sen, 760

- Prosad Chundra De & Corporation of Calcutta, 862  
 Prosad Doss v Russick Lall, 725  
 Prosunno Kumar & Jamaluddin, 390  
 Protab Chunder & Gour Chunder, 490  
 Protima Aurat v Dukhia Sirkar, 164  
 Proudfoot v Montefiori, 632  
 Provas Chand Roy, *In re*, 861, 862  
 Provincial Insurance Co v Leduc, 638  
 P R & Co v Bhagwandas, 418  
 Pudishary Krishnen & Karampally, 101, 172  
 Pullen Chetty v Ramalinga Chetty, 162  
 Punchanun Ghose v Daly, 479, 490  
 Punjab & Petum Sing, 300  
 Punjab Banking Co v Muhammad Hassan Khan, 813  
 Punjabhai & Bhagwandas 371, 389  
 Purmanundasa v Cormack, 650  
 Purmeshar & Brijo Lall, 754  
 Purshotamdas Tribhovandas & Purshotamdas Mangaldas, 180, 289, 332  
 Purushothamdoss, *In re*, 159  
 Pushong v Mania Halwani 100  
 Pusi v Mahadeo Prasad, 78, 563  
 Puthempurayal & Mangalasseri, 391  
 Puttappa Manjaya & Virabhadrappa, 310  
 Putti Narayanamurthi & Marimuthu 507  
 Pybus & Gibb, 480  
 Pyrke v Waddingham, 809  
  
 QUARMAN & Burnett, 682  
 Queen of Spain v Parr, 617  
 Quirk & Thomas, 262  
  
 R & Ashwell 512  
 R & Demers, 44 215  
 R & McDonald 511  
 R Leslie, Ltd & Sheill 70, 71 73  
 Rabiabibi & Gangadhar 152  
 Radha & Kinlock, 488  
 Radha Bai & Kamod Singh, 158  
 Radha Kanta Dass & Baerlein Bros 37  
 Radha Kishen & Bhoro Lal 71  
 Radhakishendas & Gangabai 681  
 Radha Krishna Das & Municipal Board of Benares 376 377 427  
 Radha Madhub Samonta & Sasti Ram Sen, 387  
 Radha Shivam & Behari Lal, 71  
 Radhey Shivam & Mewa Lal, 152  
  
 Radhu Hari & Narendranath Chatterjee, 155  
 Raffles & Wichelhaus, 82, 90  
 Raghava Chariar & Srinivasa, 74  
 Raghavachari & Pakkiri Mahomed, 581  
 Raghavalu & Adinarayana, 373  
 Raghavan & Alamelu Ammal, 392, 399  
 Raghavendra Gururan & Mahipat Krishna, 507  
 Raghovi & Abdul Karim, 204  
 Raghoonath Doss v Halle, 290  
 Raghubar Das Mahant & Raja Natabar Singh, 160  
 Raghunath Khandelwal & Official Assignee, 675  
 Raghunandan Nanu & Hormasjee Bezonjee, 675  
 Raghunandan Prasad & Ghulam Ala-uddin Beg, 435  
 Raghunath & Nathu Hirji, 152  
 Raghunath & Varjivandas, 100  
 Raghunath Das & Baleshwar Prasad 295, 300  
 Raghunath Prasad & Sarju Prasad, 95, 111  
 Ragnath Sahal & Mam Raj, 240, 241  
 Ragnath Sakharam & Govind Narasim, 114  
 Ragoonathdas & Morari 643, 698  
 Rahmat Ali Muhammad Faizi & Dewa Singh—Man Singh, 353  
 Rahmatulla & Ganesh Das 353  
 Paikishore & Debendranath 838  
 Railton & Mathews, 502  
 Rainbow & Juggins 500  
 Rainbow, The 622  
 Rainey (G.) & Burma Fire & Marine Insurance Co 225  
 Raj Narain & Fulkumari Devi 477  
 Raj Narain Das & Shama Nando Das, 852, 854  
 Raja Mohkam Singh & Raja Rup Singh, 109 133 176  
 Raja Udairaj Singh & Secretary of State for India, 847  
 Raja of Venkatagiri & Chinta Reddy, 223  
 Raja Rai Bahgwat Dayal Singh & Devi Dayal Sahu 178 581  
 Raja Ram & Meher Khan, 351  
 Rajagopala & Krishnasami, 697  
 Rajagopala & Sheik Dawood 799  
 Rajagopalacharyulu & The Secretary of State for India, 584

- Rajah of Venkatagiri v Vudutha Sub  
 barayudu, 397  
 Rajah Papamma Row v Sitaramayya,  
 100  
 Rajah Vurmah Valia v Ravi Vurmah  
 Kunhi, 184  
 Raju Tirumal v Pandla Muthial, 286  
 Rajan Harji v Ardesbir Hormusji, 163  
 Rajani Kanta v Haji Lal, 386  
 Rajani Kanta Das v Gour Kishore, 286  
 Rajbans Sahay v Askavan Baid, 853  
 Rajkristo Motro v Koylash Chunder, 173  
 Rajlukhy Dabee v Bhootnath, 199  
 Raj Promothonath Mittra v Gostha  
 Behari Sen, 770  
 Rakhai Chandra v Baikuntha Nath, 273  
 Rakhmabai v Govind, 24  
 Rallu v Phalla, 193  
 Ram Adhar v Ram Shanker, 857  
 Ram Bahadur Singh v Damodar Prasad  
 Singh, 203  
 Ram Bharosa v Kalla Mal, 698  
 Ram Chand Sen v Audaito Sen, 181, 373  
 Ram Chander v Ganga Saran, 830  
 Ram Chandra v Ganesh Chandra, 141  
 Ram Chandra Sahu v Kasem Khan, 564  
 700  
 Ram Charan v Rakhai Das, 790, 875  
 Ram Chunder v Manick Chunder, 604,  
 725, 729  
 Ram Coomar Coondoo v Chunder Canto  
 Mookerjee, 2, 174, 175, 179  
 Ram Das v Bhagwat Das, 604  
 Ram Das v Official Liquidator Cotton  
 Ginning Co., 39  
 Ram Dayal v Saraswati, 749  
 Ram Kinkar v Akhil Chandra, 304  
 Ram Kishen v Rani Bhagwan Kaur,  
 401  
 Ram Kissen Joydoyal v Poorun Mall  
 886  
 Ram Kumar v Jagmohan, 792  
 Ram Lal v Khuroda Mohini, 390  
 Ram Manorath Singh v Dhiraji, 849  
 Ram Narain v Ram Chunder, 303, 305  
 Ram Nath v Manni Lal, 350  
 Ram Pershal Singh v Neebhoy Singh,  
 301  
 Ram Patab v Marshall, 658  
 Ram Prasad v Sukh Ram, 388  
 Ram Prasad v Panji Lal, 240  
 Ram Prasad v Caura, 185  
 Ram Sarup v Bani Mal, 107  
 Ram Sarup v Kishan Lal, 158  
 Ram Singh v Ramchand, 711, 724  
 Ram Sukh v Brohmoy Das, 513  
 Ram Sumran Prasad v Gobind Das, 102,  
 182  
 Ram Sundar Saha v Kali Narain Sen, 80  
 Ram Sundar Saha v Raj Kumar Sen  
 Chowdhury, 105, 800  
 Ram Tuhul Singh v Biseswar Lal, 388,  
 399  
 Ram Ugrah Singh v Benares Hindu  
 University, 859  
 Rama Rao v Raja of Pittapur, 858  
 Ramachandra v The Secretary of State  
 for India, 845  
 Ramakrishna v Narayana, 845, 950  
 Ramalinga Adavai v Meenakshisun  
 daram, 434  
 Ramalinga Mudaliar v Muthuswami  
 Ayyar, 418  
 Ramalingam Chettiar v Subramania  
 Chettiar, 112, 439  
 Raman v Vairavan, 651  
 Raman Chettiar v Gopalachari, 311  
 Raman Chetti v Municipal Council of  
 Kumbakonam, 378  
 Ramasadhan v Zamindar of Ramnad,  
 878  
 Ramanand Koer v Ragunath Koer, 858  
 Ramanja v Narayana, 176  
 Ramanjulu v Aravamudu, 296  
 Ramanuja v Devanayaka, 855  
 Ramanund v Chowdry Soonder Narain,  
 483  
 Ramappa v Yellappa, 815  
 Ramasami v Kadir Bibi, 723  
 Ramasami v Piraman, 750  
 Ramasami v Rajagopala, 239  
 Ramasami Chetti v Manikka Mudali,  
 279, 280  
 Ramasami Gupta v Ramadimal, 559  
 551  
 Ramasamy v Munnayandi, 277, 279  
 Ramasamy Kon v Case, 378  
 Ramaswami v Kuppuswami, 204  
 Ramaswami Nucker v Narayaniswami  
 Nair, 402  
 Ramayya v Chandra Sekara, 725  
 Ramayyar v Shanmugam, 755  
 Ramthai v Timmasaya, 182  
 Ram Venkatesh v Bhimrao, 8  
 Ram Venkatesh v Damodar, 708  
 Ram Venkatesh v Gopi, 401

- Ramchandra Gangalison, 239, 243, 251  
 Ramchandra v Ramchandra, 790  
 Ramchandra Atmaram v Damodar Ramchandra, 388  
 Ramchandra Chintaman v Kaku Raju, 195  
 Ramchandra Ramvallabh v Vasanji, Sons & Co, 407  
 Ram Churan v Bikkhal Das, 577  
 Ramdas v S Amerchand & Co, 7, 549  
 Ramdeni Singh v Guman Raut, 317.  
 Ramdoyal v Junmenjoy, 681.  
 Ramendra Roy v Serajuddin Ahamed, 410.  
 Rameshar Marwari v Upendranath Das Sarkar, 172  
 Rameshardas Benarasisdas v Tansookhray, Bhasharail, 607  
 Rameshwar Prasad v Lachmi Prasad, 191  
 Rameshwar Prasad Singh v Rai Shyam Kishen, 438, 442, 445  
 Rameswar Koer v Mahomed Mehdi Hossein Khan, 344  
 Ramghulam v Janki Rai, 224  
 Ramgopal v Dhanji Jadhavji Bhatia, 291, 425  
 Ramiah v Somasi, 350  
 Ramier v Shunmugam Pillai, 355  
 Ramji v Dharma, 204  
 Ramji v Little, 290  
 Ramji v Rao Kishoresingh, 760, 785  
 Ramji Das v Janki Das 655  
 Ramkirpal v Gaye Det, 194  
 Ramkishun Ram v Bansu Singh, 110  
 Ramkrishna v Narayana, 945 950  
 Ramkrishna v Ramabai 303  
 Ramkuar v Shankar Dutt 424  
 Ramlal Thakursidas v Lakhmichand Muniram, 678  
 Ramlohl Thackoorsej dass v Soojunmull Dhondmull 231  
 Ramnath v Pitambar, 556, 726  
 Rampal Singh v Balbhaddar Singh, 631  
 Rampal Singh v Murray & Co, 520, 523  
 Rampartab v Foolibai, 688  
 Ramsay v Margrett, 749  
 Ramsebuk v Ramlall Koondoo, 303, 304  
 Ramsgate Victoria Hotel Co v Monte fiore, 47  
 Ramsingh Kundansingh v Sajjan Dimpji 429  
 Ran Ugrah Singh v Benares Hindu University, 880  
 Ranchhodias Nathubhai v Jeychand Khushalchand, 204  
 Ranchod v Manmohandas, 428  
 Rance Lallan v Nobi Mohan, 181  
 Rang Hahi v Mahbub, Hahi, 840  
 Ranga Ram Thakar Das v Raghbir Singh, 59  
 Rangammal v Venkatachary, 373  
 Rangunayakamma v Alwar Setti, 94, 102  
 Rangarazu v Maddura, 74  
 Rangasa v Hukumchand, 234  
 Rangaswami v Trisa Maistry, 332  
 Ranglal Sahu v Kali Shanker Sahai 392.  
 Ragnath Sikkharam v Govind, 103, 114.  
 Rani Janki Kunwar v Raja Ajit Singh, 838  
 Rani Parthi Pal Kunwar v Rani Guman Kunwar, 847  
 Ranjani Kant v Rama Nath, 395  
 Ranjit Singh v Naubat, 488  
 Rannee Annapurni v Swaminatha, 110, 133  
 Rasaji v Sayana, 438  
 Rasappa Pillai v Doraisami 391  
 Rash Behary Shaha v Nrittya Gopal Nundy, 282, 284  
 Rashik Lal v Ram Narain, 286  
 Ratanlal Ghelabhai v Amarsing, 751  
 Rathnasabapatti v Ramasami, 854  
 Ratnakalli Guranna v Vachalapu Appa Ianaidu, 250  
 Rattan Chand v Ram Kishan Murari 687  
 Ravji v Gangadharbhat, 832  
 Rawlinson v Ames, 819  
 Rawson v Johnson 317  
 Raymond v Minton 381  
 Rayner v Grote 655  
 Reid v Anderson, 243 693  
 Read v Rann 616  
 Reddaway v Banham, 677  
 Rederi Aktienbolaget Transatlantic v Fred Drughorn, 655  
 Redfern v Bryning, 825  
 Redgrave v Hurd 129  
 Redpath v Wigg 636  
 Reed v Norris 507  
 Rees v Berrington, 489, 498  
 Rees v De Bernardy, 173  
 Reeve v Davis, 571  
 Reg v Ashwell, 512  
 Reg v Karson Goja, 161

- Rajah of Venkatagiri v Vudutha Sub  
 barayudu, 397  
 Rajah Papamma Row v Sitaramayya,  
 100  
 Rajah Vurmah Valia v Ravi Vurmah  
 Kunhi, 184.  
 Raju Tirumal v Pandita Muthial, 286  
 Rajan Harji v Ardeshir Hormusji, 163  
 Rajani Kanta v Haji Lal, 386  
 Rajani Kanta Das v Gour Kishore, 286  
 Rajbans Sahay v Ashtavan Baid, 853  
 Rajkristo Mostro v Koylash Chunder, 173  
 Rajlukhy Dabee v Bhootnath, 199  
 Raj Promothonath Mittra v Gostha  
 Behari Sen, 770  
 Rakhal Chandra v Baikuntha Nath, 273  
 Rakhmabai v Govind, 24  
 Rallu v Phalla, 193  
 Ram Adhar v Ram Shinker, 857  
 Ram Bahadur Singh v Damodar Prasad  
 Singh, 203  
 Ram Bharosa v Kallu Mal 698  
 Ram Chand Sen v Auditor Sen, 181, 373  
 Ram Chandar v Gangai Saran, 839  
 Ram Chandra v Ganesh Chandra, 141  
 Ram Chandra Sihu v Kasem Khan, 564  
 700  
 Ram Charan v Rakhal Das, 790, 875  
 Ram Chunder v Manick Chunder, 604,  
 725, 729  
 Ram Coomar Coondoo v Chunder Canto  
 Mookerjee, 2, 174, 175, 179  
 Ram Das v Bhagwat Das 604  
 Ram Das v Official Liquidator Cotton  
 Ginning Co, 39  
 Ram Dyal v Saraswati, 749  
 Ram Kinkar v Akhil Chandra, 304  
 Ram Kishen v Rani Bhagwan Kaur,  
 401  
 Ram Kissen Joydoyal v Poorun Mall,  
 886  
 Ram Kumar v Jagmohan, 792  
 Ram Lal v Khiroda Mohini 390  
 Ram Manorath Singh v Dilraj 849  
 Ram Narain v Ram Chunder, 303, 305  
 Ram Nath v Manni Lal, 350  
 Ram Pershad Singh v Neerbhoy Singh,  
 301  
 Ram Pertab v Marshall, 658  
 Ram Prasad v Salil Ram, 388  
 Ram Prasad v Ranji Lal, 240  
 Ram Rattan v Gaura, 385  
 Ram Sarup v Bansi Mandir 163  
 Ram Sarup v Kishan Lal, 158  
 Ram Singh v Ramchand, 711, 724  
 Ram Sukh v Brohmoyi Das, 513  
 Ram Sumran Prasad v Gobind Das, 102,  
 182  
 Ram Sinder Sahu v Kali Narain Sen, 80  
 Ram Sundar Saha v Raj Kumar Sen  
 Chowdhury, 105, 800  
 Ram Tuhul Singh v Biswar Lal, 388,  
 399  
 Ram Ugrah Singh v Benares Hindu  
 University, 859  
 Rama Rao v Raja of Pittapur, 858  
 Ramachandra v The Secretary of State  
 for India, 845  
 Ramakrishna v Narayana, 845, 950  
 Ramalinga Adaviar v Meenakshisun  
 daram 434  
 Ramalinga Mudahar v Muthuswami  
 Ayyar, 418  
 Ramalingam Chettiar v Subramania  
 Chettiar, 112, 439  
 Raman v Vairavan 651  
 Raman Chettiar v Gopalachari, 311  
 Raman Chetti v Municipal Council of  
 Kumbakonam, 378  
 Ramanadhan v Zamindar of Ramnad,  
 878  
 Ramanand Koer v Ragunath Koer, 858  
 Ramanja v Narayana, 176  
 Ramanjulu v Aravamudu 296  
 Ramanuja v Devanyaka, 855  
 Ramanund v Chowdry Soonder Narain,  
 483  
 Ramappa v Yellappa 815  
 Ramasami v Kadar Bibi 723  
 Ramasami v Paraman, 750  
 Ramasami v Rajagopala, 230  
 Ramasami Chetti v Manikka Mudali,  
 279 280  
 Ramasami Gupta v Kaimalamal, 550  
 551  
 Ramasamy v Munnaiyandi 277, 279  
 Ramasamy Kon s Cise, 358  
 Ramaswami v Kuppaswami, 204  
 Ramaswami Naicker v Narayanaswami  
 Naicker, 402  
 Ramayya v Chandra Sekara 725  
 Ramayyar v Shanmugam, 355  
 Rambhat v Timmayya, 182  
 Ramchandra v Bhimrav, 8  
 Ramchandra v Damodhar 708  
 Ramchandra Ganuji *In re*, 401

- Ramchandra t Gangabison, 239, 243, 251  
 Ramchandra t Ramchandra, 790  
 Ramchandra Atmaram t Damodar Ramchandra, 388  
 Ramchandra Chintaman v Kalu Raju, 195  
 Ramchandra Ramvallabh t Vassanji, Sons & Co, 407  
 Ram Charan t Bakhal Das 875  
 Ramdas v S Amerchand & Co, 7, 549  
 Ramdeni Singh t Guman Raut, 917  
 Ramdoyal v Junmenjoy, 681.  
 Ramendra Roy t Serajuddin Ahamed, 440  
 Rameshar Marwari v Upendranath Das Sarkar, 172  
 Rameshardas Benarasidas t Tansookhras, Bashesharilal, 607  
 Rameshwar Prosad v Lachmi Prosad, 194  
 Rameshwar Prosad Singh t Rai Sham Kishen, 438, 442, 445  
 Rameswar Koer v Mahomed Mehdi Hossein Khan, 344  
 Ramghulam t Janki Rai, 224  
 Ramgopal v Dhanji Jadhavji Bhatia 291, 425  
 Ramiah v Somasi, 350  
 Ramier v Shunmugam Pillai 353  
 Ramji v Dharma 204  
 Ramji t Little 290  
 Ramji t Rao Kishoresingh, 760 785  
 Ramji Das v Janki Das 655  
 Ramkirpal v Gayo Det, 194  
 Ramkishun Ram t Banu Singh 110  
 Ramkrishna t Narayana 945 950  
 Ramkrishna t Ramabai 303  
 Ramkuar v Shankar Dutt 424  
 Ramlal Thakursidas v Lakhmichand Muniram, 678  
 Ramlohl Thackoorseydass t Soojunmull Dhondmull 231  
 Ramnath t Pitambar, 556 726  
 Rampal Singh t Balbhadar Singh 631  
 Rampal Singh t Murray & Co, 520, 523  
 Rampartab v Foolibai, 689  
 Ramsay t Margrett 749  
 Ramseluk v Ramlall Koondoo, 303, 304  
 Ramsgate Victoria Hotel Co v Monte fiore, 47  
 Ramsingh Kundansingh t Sajin Damji 429  
 Ran Ugrah Singh t Benares Hindu University, 880  
 Ranchhoddas Nathubhai t Jeychand Khushalchand 204  
 Ranchod v Manmohandas, 428  
 Rancee Lallun v Nobil Mohan, 181  
 Rang Ilahi t Mahbub, Ilahi, 840  
 Ranga Ram Thakar Das t Raghbir Singh, 59  
 Rangammal t Venkatachari, 373  
 Ranganayakamma t Alwar Setti, 94 102  
 Rangarazu v Maddura 74  
 Rangasa t Hukumchand, 234  
 Rangaswami t Trisa Maistry, 332  
 Ranglal Sahu t Kali Shanker Sahai 392  
 Ranganath Sakharan v Govind, 103, 114  
 Rani Janki Kunwar v Raja Ajit Singh, 838  
 Rani Pirithi Pal Kunwar v Rani Guman Kunwar, 847  
 Ranjani Kant v Rama Nath 390  
 Ranjit Singh t Naubat, 488  
 Rannee Annapurni t Swaminatha 110, 133  
 Rasaji t Sayina 438  
 Rasappa Pillai t Doraisami 391  
 Rash Behary Shaha t Nrittya Gopal Nundy, 282, 284  
 Rashik Lal t Ram Narain 286  
 Ratanlal Ghelabhai t Amarsing 751  
 Rathnasabapati t Ramasami 854  
 Ratnakalli Guranna t Vachalapu Appalanaidu, 250  
 Rattan Chand v Ram Kishan Murari 687  
 Ravji t Gangadharbhat 832  
 Rawlinson t Ames 819  
 Rawson t Johnson 317  
 Raymond v Minton 381  
 Rayner t Grote 600  
 Reid t Anderson 243, 593  
 Read v Rann 616  
 Reddaway t Banham 677  
 Rederi Aktiesbolaget Transatlantic t Fred Drughorn 655  
 Redfern t Bryning 820  
 Redgrave t Hurd 129  
 Redpath t Wigg 636  
 Reed v Norris 507  
 Rees v Berrington 489 498  
 Rees t Dr. Bernardy, 173  
 Reeve v Davis 571  
 Peg v Ashwell 512  
 Reg v Karson Coja 161

- Sita Ram v Ram Lal, 849  
Sital Prasad t Parbhu Lal, 103  
Sital Prasad, *Pe*, 588  
Sitaram t Daji, 355  
Sitaram t Harihar, 159, 160  
Sitaram t Mussamut Aheerree Heerahnnee, 160  
Sitaram t Shridhar, 277, 279  
Sitaram Marwar t Thompson, 57  
Sitarampur Coal Co t Colley, 183, 603  
Siti Fakir t Chand Bawa, 383, 387  
Siva Panda t Jijustji Panda, 301  
Siva Ramayya t Ellamma, 176  
Skillett t Fletcher, 481  
Skinner t Jager, 537  
Slack t Leeds Co operative Society, 879  
Sloman t Walter, 458  
Smart t Sanders 569, 589, 590  
Smethurst t Mitchell 651  
Smith *Pe*, *Ex parte* Bright, 559  
Smith t Anderson, 670  
Smith t Bailey, 686  
Smith t Bedouin Steam Navigation Co, 573, 663  
Smith t Chadwick, 132  
Smith t Colbourne, 807  
Smith t Dinonath, 385 398  
Smith t Green, 415  
Smith t Harrison, 794  
Smith t Hughes 83 120  
Smith t Jeyes 727  
Smith t Kay, 98  
Smith t Lascelles, 598  
Smith t Lyon 615  
Smith t Patrick, 348  
Smith t Smith 880, 881, 882, 883  
Smith t Sorby, 665  
Smith v White, 147  
Smith t Winter 720  
Smith t Wood 487  
Smith, Ltd t Great Western Rail Co, 22  
Snice t Prescott, 638  
Snockby t Thorne, 820  
Snock t David on 621  
Snock t Watts 81  
Snowdon, *Ex parte* 508  
Snort Ashwell 743  
Sobha, and Gammal t Mulund and Bili 210  
Societe Generale de Paris t Tramways Union Co t 11  
Sohan Lal t Luran Singh 472  
Sohna Mal t Imam Din, 439  
Solema Bibi t Hafez Mohammed Hossein, 678  
Solly t Rathbone, 620  
Solomon t Barker, 598  
Solomon Jacob t The National Bank of India, 402  
Solomons t Bank of England, 539, 620  
Soltau t De Hald, 873  
Somashastry t Swamirao, 386  
Somu Pillai t Municipal Council Mayavaram, 185  
Soniram Jeetmull t R D Tata & Co, 310  
Sooltan Chund t Schuller, 281, 282, 315, 317  
Soopromonnan Setty v Heudgers 641  
Soorath Nath Banarjee v Bhabysankar Goswami, 134  
Soorthunge v Mahomed, 337  
Sorabji t Dulabhbhai, 725  
Sorabshah Pestunji v Secretary of State for India 37, 127  
Sornalinga t Pachai Narayan, 468  
Soshi Bhusan t Gonesh Chunder, 878  
Soti Bhagwan Dat Shastri t Raja Ram, 180  
South African Territories Co, Ltd t Wallington 790  
Sourendra Nath Mitra t Tarubati Dadi, 568  
South Australia Insurance Co t Randell, 512  
South Barrackpore Municipality (Chairman of) t Amulya Nath Chatterjee, 378  
South British and Marine Insurance Co, Ltd t Brojo Nath 225  
Southcomb t Bishop of Exeter 798  
South Indian Industrial Ltd t Mundi Rama Jogi 57 579  
South Kanara (D R) t Sathappa Nair, 731  
Southwell t Bowditch 636 642 643  
Spalling t Ruling 541  
Sparks t Hart 122  
Spedding t Nevill 651  
Spence t Union Marine Insurance Co 12  
Spencer t Harlow 57  
Spencer t Hunt 165  
Spitt t Lavender 635

- Sreegopal v Ramchurn, 53  
 Sreepada v Sreepada, 557.  
 Sri Chand v Niader Singh, 112  
 Sri Jagannada Raju v Sri Rajah Prasada Rao, 779  
 Sri Kishan Lal v Kashmiro, 105  
 Sri Kishen v The Secretary of State for India in Council, 472  
 Sri Thakurji Maharaj v Kamta Prasad, 856  
 Srikalolapu v Gudivada, 372, 373  
 Srinivasa v Rathnasabapathi, 459  
 Srinivasa Ayyar v Sesa Ayyar, 182, 185, 372, 373  
 Srinivasa Raghava Aiyangar v Ranganatha Aiyangar, 28  
 Srinagachariar Ramasami v Ayyangar, 187  
*Staffordshire, The*, 572  
 Stambank v Shepard, 572  
 Standard Marine Insurance Co., 65  
 Staniforth v Lyall, 424  
 Stanley v Dowdeswell, 50  
 Stanley v Jones, 173  
 Stanley, Lady v Shrewsbury, 882  
 Stark, *Re*, 477  
 Starkey v Bank of England, 652  
 Startup v Macdonald, 269, 274, 308  
 Stead v Salt, 697  
 Stearine Co v Heintzmann, 599  
 Stedman v Collett, 830  
 Steedman v Drinkle, 325  
 Steeds v Steeds, 279  
 Steel v Dixon, 508  
 Steel v Lester, 674  
 Steel Bros & Co, Ltd v Dayal Khata & Co., 286  
 Steinberg v Scala (Leeds), 367  
 Stenning, *Re*, 346  
 Stephens v Badcock, 576  
 Sterne v Beck, 458  
 Steuart v Gladstone, 704  
 Stevens v Biller, 539, 540  
 Stevenson v Blakelock, 542  
 Stevenson v McLean, 41  
 Stevenson v Mortimer, 639  
 Stevenson (Hugh) & Sons v Aktiengesellschaft für Carton- und Industrie, 713  
 Stewart v Kennedy, 83  
 Stewart v Ram Chand, 176  
 Stickney v Keeble, 325  
 Stocker v Brocklephant, 875  
 Stocks v Wilson, 71  
 Stone v Cartwright, 579  
 Stonehouse v Gent, 571  
 Storer v G. W. R. Co., 761, 795  
 Streeter v Horlock, 511  
 Strickland v Turner, 135  
 Strinivasa v Strinivasa, 855  
 Stuart (Lord James) v The London & North Western Ry. Co., 789  
 Stubbs v Holywell Ry. Co., 262  
 Subba Naidu v Haji Badsha, 213, 888, 889  
 Subba Pillai v Ramasami Ayyar, 613  
 Subba Rau v Devu Shetti, 285  
 Subbaraya v Devandra, 242  
 Subbarayudu v Adinarayudu, 726  
 Subbarth Pillai v Shanmugham Pillai, 434  
 Subbier (Obba K.) Venkatachalapathi, 281  
 Subrahmania v Krishna, 357, 358  
 Subramania v Gopala, 488  
 Subramania v Mahalingasami, 391  
 Subramania v Narayanan, 591, 638  
 Subramania Aiyar v Subramania Aiyar, 9  
 Subramania Iyer v Rungappa, 383, 385  
 Subramaniam v Doraidinga, 67  
 Subramanian v Muthia, 308, 353  
 Subramanyan v Paramaswaran, 805  
 Subraya Pillai v Subraya Mudali, 170  
 Subroya Chetty v Ragammall, 477  
 Suchand v Balaram, 394, 396  
 Sudarsanam v Narasimhulu, 709, 729  
 Sudhu Singh v Lehna Singh, 301  
 Sudisht Lal v Sheobarat Koer, 105  
 Suffle v Bank of England, 354  
 Suja v Pahlwan, 507  
 Sukdevadoss v Govindoss, 234  
 Sukhdeo Das v Mangalchand, 172  
 Seleman v Abdul Latif, 729  
 Sultan v Nanu, 164  
*Sultan The*, 572  
 Sultan Nawaz Jung v Rustomji Nana bhoy, 877  
 Sultan Kani Rowthan v Mahomed Meera Rowthan, 769  
 Sumar Singh v Shib Lal, 389  
 Sumpter v Hedges, 379  
 Sumsuddin v Abdul 105, 779  
 Sundar Koer v Rai Sham Krishen, 112, 438, 444, 447, 450  
 Sundar v Parbati, 754  
 Sundar Rai v Suraj Bahi Rai, 133  
 Sundar Singh v Krishna Mills Co., 282

- Sundaraja Ayyangar v Pattanathusam  
 Tovar, 382  
 Sundarambal v Yogavanagurukkal, 113  
 Sundararaja v Lakshminammal, 25  
 Sunder Singh t Haro, 194  
 Sunder Singh t Krishen Chand, 156  
 Sungut Lal v Bajnath Roy, 345, 433  
 Sunitabala Debi v Dhara Sundari Debi,  
 106  
 Suput Singh t Imrit Tewari, 301  
 Surai Bhau v Hashmi Begam, 395  
 Suraj Bunsu Koer t Sheo Prasad Singh,  
 772  
 Suraj Malachandan Mai 602  
 Suraj Narian t Sukhu Ahir, 27, 68, 75,  
 201  
 Suranarayanamurti v S 323  
 Surdet Singh v Gujjar Singh, 479  
 Surendra Chandra Ghose, *In re*, 862  
 Surendra Lal v Secretary of State for  
 India, 521  
 Surendra Narain v Hari Mohan, 878  
 Surendra Nath Roy t Krishna Sakhi Dasi,  
 72  
 Surendra Nath Sarkar v Atul Chandra  
 Roy, 605  
 Surja v Suti Prasad, 71  
 Surja Narain v Pratab Narain, 431  
 Surya Narain Singh v Jogendra Narain  
 Roy, 440, 446  
 Suryanarayana v Narendra Thatraz, 205  
 Suryanarayana v Subbayya, 185  
 Suryanarayanamurti v Tammanna, 852,  
 855  
 Sutton v Grey, 558  
 Sutton v Tatham 561, 569  
 Swarnamoyee Debi t Hari Das Roy,  
 389  
 Sweet v Pym 622  
 Sweeting v Pearce, 565, 569  
 Swift t Jewsbury, 662  
 Swire t Francis, 660  
 Swire v Redman, 479  
 Syed Abbas Ali v Misri Lal 379  
 Syed Mahomed t Shih Vazirul Huq, 173  
 Sykes t Bladon, 615  
 Synge t Synge, 235, 287  
  
 TACOORDEEN t Nawab Syed Ali, 853  
 Fadi Sarreddi t Chelamcherla Brah  
 mayya 409  
 Tahal t Bisheshwar, 229 792, 793  
 Talbot t Lord 793  
  
 Tamizuddin t Ashrub Ali, 751, 755  
 Tamplin t James, 402, 821  
 Tamplin S S Co t Anglo Mexican, etc ,  
 Co , 330  
 Tamvaco t Simpson, 622  
 Tangya Fala v Trimbak Daga, 395,  
 399  
 Tanner v Christian 636  
 Tanner v Smart, 205  
 Taplin t Florence, 589  
 Tapling v Weston, 664  
 Tarachand v Girdhari Lal, 113  
 Tarachand v Suklal 176  
 Tasker v Shepherd, 292  
 Tate v Hyslop 633  
 Tatia v Babaji, 197, 286  
 Taylor, *Re*, 622  
 Taylor v Bowers, 372, 592  
 Taylor t Caldwell, 328  
 Taylor t Chester, 341  
 Taylor v Kymor, 621  
 Taylor v Metropolitan Ry Co , 666  
 Taylor v Portington, 787  
 Taylor, Stileman and Underwood, *Re*,  
 541  
 T C Chowdury & Bros t Girindra  
 Mohan Neogi, 579  
 Tejendro Narain t Bakshi Singh, 456  
 Tejpal v Ganga, 366  
 Tek Chand t Harjas Rai Arjan Das,  
 170,  
 Tek Chand t Morice, 438  
 Tekait Mon Mohini Jemadai t Basanta  
 Kumar Singh, 160  
 Telu Mal v Subha Singh, 240, 241  
 Tenant t Elliott 615  
 Tennant, *Ex parte* 674  
 Tennent v Tennents, 208  
 Terait Harnarayan Singh t Darshan Deo,  
 854  
 Tetley v Shand, 628  
 Texas Co , Ltd t Bombay Banking Co ,  
 633  
 Textile Manf Co , Ltd t Solomon Bro  
 thers, 335  
 Thaeler v Hardy, 233  
 Thackwray and Youngs Contract, 808  
 Thakwaj, Mchharaj t Ram Dei 108  
 Thasi Muthukannu t Shunmugavelu,  
 164  
 Thovar v Samban 847  
 Thetse, *Thi*, 571  
 Thirukumaresan t Subbaraya, 730



|   |   |
|---|---|
| <i>Winkfield The</i> 524 556                                | <i>YADORAO v Chandudas</i> 382                                  |
| <i>Winn t Bull</i> 50 51                                    | <i>Yaman v Chang</i> 293  |
| <i>Wise t Amceerunnissa</i> 753                             | <i>Yaramati t Chundru</i> 373                                   |
| <i>Withers t Reynolds</i> 281 322                           | <i>Yarlagadda Veera Ragavayya t Corantla Ramayya</i> 353        |
| <i>Wittenbaker t Calstaun</i> 11                            | <i>Yaro t Sanu Ullah</i> 877                                    |
| <i>Wolf &amp; Sons t Didyba Klumji &amp; Co</i> 168 372 407 | <i>Yellappa t Desayappa</i> 547                                 |
| <i>Wolmershausen t Gullick</i> 93                           | <i>Yenna Tatavayya t Kararla Chelavayya</i> 431                 |
| <i>Wolstenholme t Sheffield Band</i> 518                    | <i>Yogambal t Nura Pillai</i> 396 399                           |
| <i>Wolverhampton Corporation t Immons</i> 764               | <i>Yonge t Reynell</i> 700                                      |
| <i>Wood t Priestner</i> 473                                 | <i>Yonge t Toynbee</i> 587 596                                  |
| <i>Wood t Rowcliffe</i> 707                                 | <i>Young Ex parte</i> 470                                       |
| <i>Wood t Wood</i> 709                                      | <i>Young t Cole</i> 694   |
| <i>Woolfe t Horne</i> 638                                   | <i>Young &amp; Co t Corporation of Royal Leamington Spa</i> 375 |
| <i>Wright t Carter</i> 100                                  | <i>Yusuf Sir Mahomed t Secretary of State for India</i> 50      |
| <i>Wright t Vanderplank</i> 114                             |   |
| <i>Wulff t Jay</i> 499                                      |   |
| <i>Wylde t Radford</i> 538                                  |   |
| <i>Wythes v Iabouchere</i> 479                              |   |
|   | <i>ZAFAR AHSAAN t Zibanda Khat</i> 4                            |
| <i>YFROS t Wickham</i> 569                                  | <i>Zinc Corporation t Hirsch</i> 169                            |

# THE INDIAN CONTRACT ACT

## (ACT IX OF 1872)

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts, It is hereby enacted as follows

Preamble

### PRELIMINARY

1.—This Act may be called the Indian Contract Act,

Short title 1872

Extent It extends to the whole of British India, and it shall come into force on the first day

Commencement of September, 1872

*The enactments mentioned in the schedule hereto are repealed to the extent specified in the third column thereof, but nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract (a), not inconsistent with the provisions of this Act*

Enactments repealed

**Repeal**—The portion in italics has been repealed by the Repealing and Amending Act, 1914 The Schedule also has been repealed by the same Act

**Law anterior to Contract Act; Introduction of English Law into India.**—The charters of the eighteenth century which established Courts of justice (b) for the three presidency towns of Calcutta, Madras,

(a) The words not inconsistent with the provisions of this Act are not to be connected with the clause nor any usage or custom of trade In the section as cited by the Judicial Committee there is no comma after contract *Irrawaddy Flotilla Co v*

*Bugwandas* (1891) L R 18 I A 121 127 18 Cal 620 627 See further at p 10 below

(b) These were at first the Mayors Courts, which, in Calcutta, were superseded by the Supreme Court in 1773, and finally by the High Court in 1862

and Bombay, introduced into their jurisdictions the English common and statute law in force at the time (c) so far as it was applicable to Indian circumstances (d) It is, however, a matter of controversy whether English law was introduced by the charter of 1726 (13 Geo I) so as to extend to India the statutes passed up to that date only, or subsequently also by the charters of 1753 and 1774 so as to embrace statutes up to 1774 (e)

**Introduction of native Law of Contract into India** —The indiscriminate application of English law to natives of India within the jurisdiction of the Supreme Courts led to many inconveniences (f) To obviate this, the statute of 1781 (21 Geo III c 70, s 17) empowered

The Mayors' Courts in Madras and Bombay were replaced, in 1797, by the Recorders' Courts The Recorder's Court in Madras was abolished in 1799 and that in Bombay in 1803, and a Supreme Court was established in its stead, which again was superseded by a High Court in both places in 1862

(c) Though this view of the introduction of English law into India was pronounced incorrect and unreasonable by the Indian Law Commissioners in their celebrated *lex loci* Report of 31st October, 1840, it may now be taken as an accepted doctrine The Commissioners maintained that neither the Hindu nor the Mahomedan law was the *lex loci* of British India, as it was so interwoven with religion as to be unfitted for persons professing a different faith and they held that, there being no *lex loci*, the English law became *ipso jure* the *lex loci* when any part of British India became a possession of the British Crown and binding upon all persons who did not belong to the Hindu or Mahomedan community They recommended the passing of an Act declaring a *lex loci* for British India founded on the English Law, but the recommendation was never carried into effect See in this connection *Naroy v Pogers* (1867) 4 B H C L, 17—26, *The Indian Chief* (1891) 3 Robinson Adm pp 29, 20, w l r Lord Stowell

showed a much better understanding than the Indian Law Commissioners of the nature of Asiatic personal law, and the cases cited in the next note

(d) Thus it has been held that the Statute of Mortmain 9 Geo II c 36, does not apply to India (*Mayor of Lyons v East India Co* (1836) 1 M I A 17a, 43 R R 27 83), similarly the law as to forfeiture for suicide (*Adi Gen of Bengal v Panee Surnomoye Dossee* (1863) 9 M I A 391) and the law as to maintenance and champerty (*Pam Coomar v Chunder Canto Mookerjee* (1876) L R 4 I A 23) do not apply to India as not being applicable to Indian circumstances

(e) This question has not only an historical interest derived from the trial and conviction of Nuncomar under the English statute of 1728 (2 Geo II c 2a) According to the view that only the statutes up to 1726 were introduced into India the conviction under the statute of 1728 would be illegal It would, however be legal according to the other view, and that view was maintained by Sir James Stephen in his *Nuncomar and Impey*, vol II See Ilbert on the Government of India pp 34 35

(f) Cowell's Tagore Law Lectures, 3rd ed p 55 Under the regulating Act of 1773 the Supreme Court of Calcutta practically exercised a general jurisdiction over the whole of Bengal

the Court at Calcutta (being then the Supreme Court), and the statute of 1797 (37 Geo. III. c. 142, s. 13) empowered the Courts of Madras and Bombay (being then the Recorder's Courts) to determine all actions and suits against the inhabitants of the said towns provided that their succession and inheritance to lands, rents, and goods, and all matters of contract and dealing between party and party, should be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentooes (Hindus) by the laws and usages of Gentooes, and where only one of the parties should be a Mahomedan or Gentoo by the laws and usages of the defendant (g). The effect of these statutes was to supersede English law so far as regards Hindus and Mahomedans in the case of contracts and other matters enumerated in the statutes, and to declare the right of Hindus and Mahomedans to their own laws and usages. The result was that in a suit on contract, for instance, between Hindus, the Hindu law of contract was applied, and the Mahomedan law in the case of a contract between Mahomedans, and this continued up to the enactment of the Indian Contract Act.

**Native Law of Contracts as administered by High Courts**—The statute of 1781 applied to the Supreme Court at Calcutta, and the statute of 1797 applied to the Recorder's Courts in Madras and Bombay. In 1862 High Courts were established for each of the presidency towns of Calcutta, Madras, and Bombay, but the same personal law continued to be administered to Hindus and Mahomedans, and is administered to them even at the present day subject to legislative enactments. Turning to matters of contract, the Hindu law of contract was in fact applied by the High Courts in the exercise of their original jurisdiction to Hindus, and the Mahomedan law to Mahomedans, up to the passing of the Contract Act in 1872, although the Courts to which the statutes of 1781 and 1797 were applicable had been abolished. The preservation of this jurisdiction appears to be accounted for by the charters of the High Courts. Taking the case of the Calcutta High Court, the combined effect of the Letters Patent of 1862 (cl. 18) and of the amended Letters Patent of 1865 (cl. 19) (h) was to render it incumbent upon the

(g) For similar Indian enactments, see note (f) at p. 6, *post*.

(h) "And we do further ordain that with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort

William in Bengal in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued."

High Court to apply in the exercise of its ordinary original civil jurisdiction the same *law or equity* that would have been applied by the Supreme Court. Now, the law or equity applied by the Supreme Court being under the statute of 1781 the Hindu law of contract to Hindus, and the Mahomedan law of contract to Mahomedans, the provision in that statute for applying the native law of contract to natives became incorporated by implication in the charters of 1862 as well as 1865, and in this manner that provision came to have effect in the High Court. This was, however, subject to the legislative powers of the Governor General in Council as provided by the forty fourth clause (1) of the charter of 1865. The Indian Legislature had, therefore, the power to alter by legislative enactment the provisions of cl 19 of the charter, and this is done in the case of contracts by the Indian Contract Act. The result is that notwithstanding the provisions of cl 19 of the charter of 1865 which directs the High Court to apply the same law or equity that would have been applied by the Supreme Court (*i e* to apply, *inter alia* the native law of contract to natives) the High Court has now to administer the law as laid down in the Indian Contract Act whether the parties to the suit be Hindus Mahomedans or other wise (2). In other words, the "law or equity" required to be administered by the High Court under cl 19 of the amended Letters Patent is, in matters of contract modified by the Indian Contract Act and other enactments relating to particular contracts. Subject however, to any law made by the Governor General in Council the High Courts are still bound, in the exercise of their ordinary original civil jurisdiction, to apply the native law of contract to natives as comprised in the expression "law or equity" in cl 19.

As respects the High Courts in Madras and Bombay, the statute of 1797 contained a provision similar to that of the statute of 1781 for applying Hindu law to Hindus and Mahomedan law to Mahomedans. The statute of 1797 however, applied to the Recorders Courts in Madras and Bombay. Those Courts were superseded by a Supreme

(1) And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor General in Council exercised at the meetings for the purpose of making laws and regulations and also of the Governor

General in cases of emergency under the provisions of an Act of the twenty fourth and twenty fifth years of our reign chapter sixty seven and may be in all respects amended and altered thereby

(2) See *Madhub Chunder v Rajcoomar Doss* (1874) 14 B L R 78

Court in Madras in 1799, and in Bombay in 1823. The charter of the Supreme Court of Madras and that of the Supreme Court of Bombay contained similar provisions for the application of Hindu and Mahomedan law. The "law or equity" administered by the Supreme Courts in Madras and Bombay thus consisted in the application of Hindu law to Hindus and Mahomedan law to Mahomedans, and the same "law or equity" is directed to be applied by the High Courts in Madras and Bombay, by virtue of their charters (which closely resemble those of the Calcutta High Court), to cases coming before those Courts in the exercise of their ordinary original civil jurisdiction. See 17 of the statute of 1781 and s. 13 of the statute of 1797 referred to above have been repealed by the Government of India Act, 1915. Sec. 112 of the latter Act reproduces the sections almost verbatim.

**Law administered in Mufassal Courts.**—The old Bengal Regulation III of 1793 (s. 21) directed the Judges in the Zilla and City Courts in cases where no specific rule existed to act according to justice, equity, and good conscience. Similar provisions occurred in the Madras Regulation II of 1802, s. 17. Both these regulations are now repealed, but the direction to act, in the absence of any specific rule, according to justice, equity, and good conscience, still retains its place in the Bengal Civil Courts (Act XII of 1887, s. 37) and in the Madras Civil Courts (Act III of 1873, s. 16).

As to the Courts in the Mufassal of Bombay, the Bombay Regulation IV of 1827, s. 26, which is still in force, provides that the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case, in the absence of such Acts and Regulations, the usage of the country in which the suit arose, if none such appears, the law of the defendant, and in the absence of specific law and usage equity and good conscience.

The expression "justice, equity, and good conscience" has been interpreted to mean the rules of English law so far as they are applicable to Indian society and circumstances (k). This expression also occurs in Indian Acts relating to Civil Courts in other parts of British India (l).

(k) *Waghela Rajsanji v. Sheikh Masudin* (1887) L. R. 14 I. A. 89, 96, 11 Bom. 551, 561, *Dada v. Babaji* (1865) 2 B. H. C. 36, 38, *Webbe v. Lester* (1865) 2 B. H. C. 52, 56.

(l) Act XII of 1887, s. 37 (Bengal,

North Western Provinces, and Assam), Act IV of 1872, s. 5, as amended by Act XII of 1878 (Punjab), Act XX of 1875, ss. 5, 6 (Central Provinces), Act XVIII of 1876, s. 3 (Oudh), and Act XIII of 1898, s. 13 (Burma). Originally

**Applicability of the Act.**—The second clause of s 1 of the Act says in the most general terms that the Act is to extend to the whole of British India. These words are large enough to include all Courts and persons of all denominations. The third clause of s 1 provides that nothing contained in the Act shall affect the provisions of any statute not thereby expressly repealed. The schedule of the Act enumerates the enactments repealed by the Act, but this enumeration does not include the provision in the statutes of 1781 and 1797 directing Hindu law to be applied to Hindus and Mahomedan law to Mahomedans. This circumstance gave rise, in *Madhub Chunder v Rajcoomar Doss* (m), to a question as to the applicability of the Contract Act to Hindus in cases coming before the High Court in the exercise of its original civil jurisdiction. The parties to the suit were Hindus, and the case came before the High Court of Calcutta in the exercise of its original civil jurisdiction. On behalf of the plaintiff it was contended that the Contract Act did not apply, and that the case was governed, as provided by s 17 of the statute of 1781, by the Hindu law of contract, which, it was alleged, did not render an agreement in restraint of trade void, as was done by s 27 of the Act. It was, however, held that the Act did apply to Hindus, having regard to the general words used in cl 2 of the section, as respects the non repeal of the statute of 1781, it was said that it was not necessary to repeal it, as the Supreme Court to which it applied had been abolished, and there was nothing left to which it could apply.

**Scope of the Act.**—The Contract Act does not profess to be a complete code dealing with the law relating to contracts. As appears from the preamble, the Act purports to do no more than define and amend certain parts of that law. No doubt it treats of particular contracts in separate chapters, but there is nothing to show that the

the words were synonymous with the rules of natural reason, or the law of nature, but an Englishman would naturally interpret 'them' as meaning such rules of English law as he happened to know and considered applicable to the case. Ilbert, Government of India, 2nd ed 330. Thus the Common Law has acquired in India a kind of moral pre-dominance like that which Roman law

obtained under the name of written reason, in various regions of Continental Europe where it was not recognised as having positive authority especially in the customary law provinces of France under the old monarchy. Cf Pollock, The Expansion of the Common Law pp 132—134.

(11) (1874) 14 B L P 76

Legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts (n)

In *Ramdas v Amerchand & Co* (o) the point for decision was whether a railway receipt was an "instrument of title" within the meaning of s 103 of this Act. It was contended that it was not, for the following reasons. First, that the Indian Contract Act was primarily a consolidating Act, and therefore ought, in default of a clear expression to the contrary, to be read as embodying the law as existing when it was passed. Secondly, that it was improbable that the Indian Legislature could have taken the lead in a legal reform for which England had to wait until the passing of the English Factors Act of 1877. In dealing with these arguments, the Judicial Committee said "Their lordships cannot attach any weight to either consideration. The Indian Contract Act recites the expediency of defining and amending certain parts of the law relating to contracts. It is therefore an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Again, Their Lordships do not see any improbability in the Indian Legislature having taken the lead in a legal reform. Such a reform may have been long recognized as desirable without an opportunity occurring for its embodiment in a legislative enactment, and it may well be that the opportunity occurred sooner in India than in this country, where the calls for legislative action are so much more numerous."

**How far native Law of Contracts is still in force**—As stated above, the Contract Act does not cover the whole field of contract law. In cases, therefore, not provided for by the Contract Act or other legislative enactments relating to particular contracts, it is incumbent upon the High Courts, in the exercise of their original jurisdiction, to apply the Hindu law of contract to Hindus and the Mahomedan law of contract to Mahomedans. This is because of the provisions of the charters of those Courts noted at pp 3, 4, *ante*, which substantially

(n) *Irrawaddy Flotilla Co v Bug*  
*wandas* (1891) L. R. 18 I. A. 121, 18  
Cal 620, 628, 629, cited 56 I. A.  
(1929) at p 178. The Act, so far as  
it goes is exhaustive and imperative

*Motors Bilee v Dhurmodas Ghose* (1903)  
L. R. 30 I. A. 114, 125, 30 Cal 539,  
548

(o) (1916) L. R. 43 I. A. 164, 170, 40  
Bom 630, 636

continued the direction in this respect of the Acts of 1781 and 1797 (*p*) As an instance of the above proposition may be mentioned the rule of the Hindu law of contract known as *damdapat*, according to which interest exceeding the amount of the principal cannot be recovered at any one time (*q*) This rule is still in force in the Bombay Presidency (*r*) and in the presidency town of Calcutta (*s*), but it is not recognised outside that town (*t*) or in the Madras Presidency (*u*) There is, however, a difference of opinion as to whether the rule is abrogated by the Transfer of Property Act 1882 (*v*), as regards interest on mortgages governed by that Act It has been held by the High Court of Madras that it is (*w*) by the High Court of Bombay (*x*) and Calcutta (*y*), that it is not Another instance is the rule applicable to Hindus governed by the Mitakshara law in the Bombay Presidency, that in the case of a debt wrongfully withheld after demand of payment has been made, interest becomes payable from the date of demand by way of damages This rule, according to the Bombay High Court, is not affected either by the Interest Act 1839, or by the Contract Act (*z*) The rule, however, is not applied to Hindus in the Madras Presidency (*a*) But such

(*p*) It will be seen from what is said above that the statement in Ilbert, Government of India, 2nd ed p 327 is not formally accurate so far as it implies that these provisions are still in force by virtue of the Acts themselves yet in *Madhwa Sidhanta v Venkataramanjulu* (1903) 26 Mad 662, 670 the Act of 1797 was assumed to be still in force

(*q*) See The Rule of Damdupat, by Gramjee R Vicajee, in *Journ Soc Comp Legisl* for December, 1900, at p 464

(*r*) *Dhondu v Narayan* (1863) 1 B H C 47, *Akushalchand v Ibrahim* (1866) 3 B H C A C 23, *Nathubhai v Mulchand* (1868) 5 B H C A C 196, *Halima Manji v Meman Ayab* (1870) 7 Bom H C O C 19, *Pavanaga v Govind* (1873) 10 Bom H C 382, *Ramchandra v Bhimrai* (1877) 1 Bom 577, *Ganpati v Adarji* (1877) 3 Bom 312, *Dawood v Mullubhdas* (1893) 18 Bom 227, *Gopal Ramchandra v Gangaram Anant Shet* (1895) 20 Bom 721 over ruling *Shri Ganesh v Keshavnai* (1890) 15 Bom

620 *Harilal v Nagar* (1896) 21 Bom 38, *Ali Saheb v Shahji* (1895) 21 Bom 85

(*s*) *Nobin Chunder v Romesh Chunder* (1887) 14 Cal 781

(*t*) *Het Narain v Ram Dens* (1883) 12 C L R 590

(*u*) *Annaji Rou v Ragubai* (1883) 6 Mad H C 400

(*v*) See ss 86 and 88 of the Act Both these sections have been repealed by the Code of Civil Procedure, 1908, and are reproduced in that Code in O 34 rr 2 and 4

(*w*) *Madhwa Sidhanta v Venkataramanjulu* (1903) 26 Mad 662

(*x*) *Jeewanbai v Manondis* (1910) 35 Bom 199

(*y*) *Kunja Lal v Varsanba* (1915) 42 Cal 826, 31 I C 6

(*z*) *Saunalanappa v Shirbawaica* (1907) 31 Bom 354

(*a*) *Sibramania Aiyar v Subramania Aiyar* (1908) 18 Mad 1 1 245

cases are very few, and the native law of contract may, for all practical purposes, be regarded as having been superseded by the Contract Act and other enactments relating to particular contracts

**Acts and Regulations not expressly repealed**—The laws made by the Legislatures for the presidencies of Bengal Madras, and Bombay, before the date of the Government of India Act of 1833 (3 & 4 Will IV c 85), were known as “Regulations” The statute of 1833 established a legislature for the whole of British India, and the laws made under that statute, and the subsequent enactments modifying that statute, are known as “Acts” As regards the Regulations, it may be stated that a major part of them has been repealed by subsequent Indian legislation Among the Acts relating to particular contracts and not expressly repealed by the Contract Act may be mentioned the following Act XXXII of 1839 as to interest, Act XXVIII of 1855 as to usury, Act IX of 1856 as to bills of lading Act XIII of 1859 as to breaches of contracts by artificers, the Merchant Shipping Acts of 1854 and 1859, Act III of 1865 as to contracts with common carriers, and Act V of 1866 as to assignment of policies of insurance The Acts enumerated above were passed before the enactment of the Contract Act Among the Acts dealing with particular contracts and passed after that date may be noted the Negotiable Instruments Act XXVI of 1881, the Transfer of Property Act IV of 1882 Merchant Shipping Act V of 1883, Act XXI of 1883 as to contracts with emigrants, and Act IX of 1890 as to contracts with railways

**Saving of usage or custom of trade, etc.**—The term “usage of trade” is to be understood as referred to a particular usage to be established by evidence and perfectly distinct from that general custom of merchants which is part of the law of the realm and is to be collected from decisions, legal principles and analogies and according to the opinion now received, can still be increased by proof of living general (not merely local) usage (b) Such a usage remains unaffected by the provisions of the Act, even though it may be inconsistent with those provisions Both the reason of the thing and the grammatical construction of the section (c) require that the words ‘not inconsistent

(b) See *Bechuanaland Exploration Co v London Trading Bank* [1898] 2 Q B 658, *Feldstein v Schuler & Co* [1902] 2 K B 144

(c) In the section as cited by the Judicial Committee, there is no comma after contract see L R 18 I A at p 127

with the provisions of this Act " should not be connected with the clause " nor any usage or custom of trade " and apply only to the immediately preceding words " nor any incident of any contract ' This view was taken by the Judicial Committee in *Irrauaddy Flotilla Co v Buguandas* (d) The contrary seems to have been assumed by the Bombay and Calcutta High Courts in two earlier cases (e) Both these cases were considered by the Judicial Committee in the above case In both these cases, again, the opinion was expressed by the Bombay and Calcutta High Courts that the liability of a common carrier under the common law of England, which renders him liable for all loss or damage to goods except when caused by the act of God or the King's enemies, was a " usage of trade," the one Court holding that it was inconsistent, and the other that it was consistent, with the provisions of the Contract Act In the Privy Council case cited above, the Judicial Committee were inclined to the opinion that the liability of a common carrier under the English common law as an insurer of goods was not a usage of trade, but an " incident " of the contract quite consistent with the provisions of the Act Such an incident is not inconsistent with the provisions of ss 151 and 152 of the Act, having regard to the words " in the absence of any special contract " occurring in s 152 All these cases are considered more fully in the notes to s 151 See also as to " usage of trade " in the case of High Court attorneys, s 171 and *In re McCorkindale* (f), there cited

**Not inconsistent with the provisions of this Act**—A stipulation in a contract of guarantee that the surety shall not have the benefit of s 133 has been held to be inconsistent with the Act (g)

**Evidence as to usage of trade.**—In this connection may be noted the provisions of s 92 (5) of the Indian Evidence Act, 1872, which enacts that, though a contract may be in writing oral evidence may be adduced to prove any usage or custom by which incidents not expressly mentioned in the contract are usually annexed to contracts of that description, provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the con

(d) (1891) 1 R 18 I A 121, 127, 10 Cal 166 185  
18 Cal 620 627

(e) *Kuterry v The Great Indian Peninsular Railway Co* (1878) 3 Bom 101 113 *Mothora Kant Shaw v The Indus General Steam Navigation Co* (1883)

(f) (1891) 6 Cal 1

(g) *Chitji ppi & Co v Vinnajal Kannaiah* (1911) 47 B m 177, 58 I C 184

tract (h) And further such incident should not be inconsistent with the general provisions of the Contract Act, having regard to the words "nor any incident of any contract not inconsistent with the provisions of this Act" This is a reproduction of the English law on the subject (i) As to the evidence necessary to prove a usage of trade, it is enough if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient imported by the parties into their contract To prove such a usage, there needs not either the antiquity, the uniformity, or the notoriety of custom in its technical sense, the usage may still be in course of growth, and may require evidence for its support in each case (j) See also Evidence Act s 13 (b)

Sections referring to usage or custom of trade—S 110 provides that an implied warranty of goodness of quality may be established by the "custom of any particular trade" S 190 enacts that an agent cannot delegate his authority to another unless allowed by the "ordinary custom of trade" Similarly an agent is bound, in the absence of directions from the principal to conduct business according to "the custom which prevails in doing business" of the same kind at the place where the agent conducts such business (s 211) It may here be observed that the expression "usage or custom of trade" used in s 1, as well as the sections referred to above, relates to a particular usage as distinguished from a general or universal usage A general usage pervading all trades has no binding force if it is inconsistent with the provisions of the Act A general usage is equivalent to a general law, and no general law or usage in contravention of the general law laid down by the Contract Act can be consistent with the validity of the Act itself (k)

(h) See *Rittons Rouji v Bonbay United Spinning and Weaving Co* (1917) 41 Bom 518 at pp 538 540 37 I C 271

(i) *Per Cur* in *Brown v Byrne* (1855) 3 F & B 715 23 L J Q B 316 and in *Humfrey v Dale* (1857) 7 F & B 274 26 L J Q B 137 140

(j) *Juggomohun Ghose v Manickchand* (1859) 4 W R 8 10 7 M I A 263 282 *Wittenbaker v Galstaun* (1917) 44 Cal 917 at p 925 43 I C 11

The allowance of new usage involves the possibility of allowing change in previous usage *Moult v Halliday* [1898] 1 Q B 125 130

(k) *Moothora Kant Shah v The India General Steam Navigation Co* (1883) 10 Cal 166 185 See also *Meyer v Dresser* (1863—4) 16 C B N S 646 33 L J C P 289 where Erle CJ said

It is a contradiction to say the law does not give the right and yet that there is

**Choice of law governing contract.**—It may be doubtful what law is to be applied to decide on the validity or the interpretation of a contract, or both, as where the contract is made in one jurisdiction and to be performed in another, or is sued on in a jurisdiction where it was not made or to be performed. The Act does not deal with questions of this kind.

In ordinary circumstances the proper law of a contract (to use Mr Dicey's convenient expression) will be the law of the country where it is made (l). But where a contract is made in one country and to be performed wholly or in part in another, the proper law may be presumed to be the law of the country where it is to be performed (m).

But these rules are only in the nature of presumptions, and subject to the intention of the parties, whether expressly declared or inferred from the terms and nature of the contract and the circumstances of the case (n). The subject cannot be discussed at large here, the above rules, however, are settled and will commonly be found sufficient.

Generally the capacity to contract follows the law of domicile at the time of making the contract (o), but capacity to contract with regard to immovable property is determined by the local law of its situation (p). This of course is a matter of law which the parties cannot alter. A large proportion of the decisions under this head have been in matrimonial causes, but the special complications arising in questions of marriage and divorce are outside the scope of the present Act and of the ordinary law of contract (q).

The Transfer of Property Act IV of 1882, s. 4, provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Contract Act.

a universally established usage to allow it. A universal usage cannot be set up against the general law.

(l) Dicey, *Conflict of Laws*, 4th ed., Rule 155, *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115, 122 (in Ex. Ch., a classical judgment of a very strong Court delivered by Willes J.).

(m) *Ibid.*, *Cox v. The Governors of Bishop Cotton School* (1874) Punj. Rec. No. 85.

(n) Dicey, Rule 152, sub rr. 1 and 2 *Hamlyn v. Talisker Distillery* (1894)

A. C. 202 is now the leading English authority. And see *Abdul Kadir v. Appayansami* (1903) 27 Mad. 131, 31 I. A. 1 (parties bound according to the law as they understood and adopted it at the time, though their interpretation proved erroneous).

(o) *Lachmi Narain v. Fatah Bakhur* (1902) 25 All. 195, Dicey, Rule 149.

(p) *Bank of Africa v. Cohen* [1900] 2 Ch. 129, C. A.

(q) See *Ogden v. Ogden* [1908] 1 P. 46, C. A.

**Act not retrospective.**—The provisions of this Act do not apply to contracts made before the Act came into force (r) Ss. 1

2.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context

Interpretation  
clause

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise
- (c) The person making the proposal is called the “promisor,” and the person accepting the proposal is called the “promisee”
- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise
- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement
- (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises
- (g) An agreement not enforceable by law is said to be void.
- (h) An agreement enforceable by law is a contract
- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract

the promise can really be simultaneous with the performance for which it is exchanged, as the theory of the Common Law requires it to be. Both these reasons (though the force of the latter appears to be destroyed in British India by sub s (d), as we shall see) appear to be sound, and sufficient on principle to justify the language of the Act. The case of mutual promises will be considered when we come to it under sub s (d).

**Promise and Consideration** —Again, the technical use of the word “promise” in the Act is far narrower than the popular use. Express words of promise may be and often are in law no more than a proposal (*w*). In common life many promises are made, and regarded as morally binding between one person and another, without any “view to obtaining the assent of that other” to the contents of the promise. In common speech no one thinks of acceptance by the promisee as being an essential condition which must be satisfied before a declaration of intention amounts to a promise. It may be asked, then why the word “promise” should not have retained its literal and proper meaning and further why all deliberate promises should not be binding subject to necessary exceptions and regulations. For example, a promisor could not be held to remain bound if the promisee refused to accept and some rules of evidence would be required by way of caution, so that men should not be burdened by legal obligations in consequence of hasty or trifling words which the other party had no moral right to take seriously. The answer is that the way thus suggested has indeed been taken by other systems of law, and especially the modern Roman law which has been adopted on the continent of Europe and in the Kingdom of Scotland but the common law has taken a distinct road of its own. Apart from the peculiar case of a promise made by deed English law will not enforce a promise unless it was given for value, that is, not necessarily for an adequate value, but for something which the law can deem of some value and the parties treat as such by making it a subject of bargain. The value so received in exchange for the promise may consist in present performance for example the delivery of goods, or it may itself be the promise of a

(w) Thus a letter requesting a loan of money, and promising repayment with interest on a certain day is not a promissory note but a mere proposal for a

loan. *Dharmadasi v. Attaram* (1889) 13 B. L. 661. *Venkataram v. Lokanathammal* (1897) 7 M. L. J. 270.

performance to come. These elements are embodied in the definition of consideration by cl (d) of our section. This clause is especially open to the remark that what purports to be interpretation of terms is really substantive enactment. Only in s 25 however, with partial anticipations in ss 10, 23, and 24 does it appear for what purpose the notion and definition of consideration have been introduced.

**Definition of Consideration**—The terms of the Indian definition must now be examined. They do not appear to follow those of any authoritative English exposition, they expand, with only verbal difference, those of one of the explanations in the Commissioners' original draft (x). Whether it was so intended by the framers or not, some of the terms are capable in their literal meaning, of restoring a doctrine which was long ago finally disallowed in England, and, more over, they have been held to have that effect. We take the material phrases in order.

“**At the desire of the promisor.**”—The act constituting the consideration must have been done at the desire or request of the *promisor*, as when a person contracts a marriage in consideration of a promise of a settlement (y). An act done at the desire of a third party is not a consideration. Thus a promise by the defendants to pay to the plaintiff a commission on articles sold through their agency in a market constructed by the plaintiff not at the desire of the defendants, but of the collector of the place, is void under s 25, being without consideration (z). Nor can it be supported under cl 2 of that section which enacts that an agreement without consideration is void unless it is a promise to compensate a person who has already voluntarily done something for the promisor. The expression *voluntarily* appears to be used in contradistinction to the words *at the desire of the promisor* (a). In

(x) S 10 expl 3. A good consideration must be something which at the desire of the person entering into the engagement *another person* [B] has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing. None of the illustrations show any intention to alter the modern common law.

(y) *Nanjula Swami Chetty v Kana garaju* (1919) 49 Mad 154 159, 49 I C 660. It does not follow that where there

are several promises included in one transaction a distinct desire must be found for each one though the comment in *Laksheshwar v Sadashiv* (1925) 27 Bom L R 1456 93 I C 930 A I R 1926 Bom 54 seems to go near to asserting this. *qz* whether in that case there was a concluded agreement at all.

( ) *Durga Prasad v Balloo* (1880) 3 All 221.

(a) *Sindha Shri Ganpatisingji v Abraham* (1895) 20 Bom 755 758.

this case, even if the market were not established by the plaintiff at the desire of the defendants, the agreement would be binding, provided it was done by the plaintiff voluntarily *for the defendants*. The Court, however, found that the market was not constructed by the plaintiff for the defendants so as to bring the case within the provisions of s 25, cl 2

Questions may sometimes arise whether the thing done by the plaintiff claiming under a promise was in fact done *at the desire of the promisor*. The Commissioners of the Howrah Municipality created themselves by deed trustees for the purpose of building a town hall in Howrah and inviting and collecting subscriptions for that purpose. The defendant was a subscriber to this fund of Rs 100, having signed his name in the subscription book for that amount. As soon as the subscriptions allowed, the Commissioners, including the plaintiff, who was also vice chairman of the municipality, entered into a contract with a contractor for the purpose of building the town hall. The defendant not having paid his subscription, a suit was brought against him by the plaintiff on behalf of himself and all the other Commissioners who had rendered themselves liable to the contractor. It was held that the suit would lie, as there was a contract for good consideration. It was stated in the course of the judgment that the subscriber knew the purpose to which the subscriptions were to be applied, and also knew that on the faith of their subscription an obligation was to be incurred to pay the contractor for the work (b). In fact, the act of the plaintiff (promisee) in entering into the contract with the contractor may be said in this case to have been done at the desire of the defendant (promisor), so as to constitute a consideration within the meaning of the section for the promise to pay the subscription. If there were no contract with the contractor, or if no liability had been incurred and nothing substantial had been done on the faith of the defendant's promise the promise to pay the subscription would have been without consideration, and therefore void. No similar decision is known to have been given in England, and it seems doubtful whether there was really a sufficient request by the defendant to the plaintiff and those whom he repre-

(b) *Kedar Nath v Gorie Mahomed* (1880) 14 Cal 64. The statement of the facts in the body of the report is (as is too commonly the case in *In lran* reports) inadequate. *Dist Adalat Das v Prem Chant*

(1128) 180 I C 103, 49 C I J 278. A I R 1909 Cal 369 (no evidence of plaintiff's expense being incurred at defendant's request)

sented. It would seem to follow that in the opinion of the Calcutta High Court every promise of a subscription to a public or charitable object becomes a legal promise, and enforceable by the promoters, as soon as any definite steps have been taken by them in furtherance of the object and on the faith of the promised subscriptions. Such is certainly not the general understanding of the profession in England (c). In an Allahabad case where a Mahomedan subscribed Rs 500 to a fund started to rebuild a mosque, and no steps were taken to rebuild the mosque, it was held that the promise was without consideration, and that the subscriber was not liable (d). At all events a voluntary payment, even if repeated, is not in itself evidence of a promise to continue it (e).

“Or any other person.”—In modern English law it is well settled that consideration must move from the promisee (f). Under the Act, however, consideration may proceed from the promisee *or any other person*. The result, according to the decisions now to be cited, is to restore the doctrine of some earlier English decisions which are no longer of authority in England. In *Dutton v Poole* (g), decided so far back as 1688, where the father of a bride was about to sell timber on his estate to provide a marriage portion for her, and refrained from doing so on the eldest son promising to pay the amount to her, it was held that the daughter could maintain an action against the son on the promise to the father. It will be observed that no consideration proceeded from the daughter. She was not a party to the contract, and the whole consideration moved from the father. On the faith of the son's promise, the father abstained from felling the timber, and

(c) There is believed to be some American authority (seemingly not in any of the Courts whose decisions carry most weight outside their own jurisdiction) in favour of this view.

(d) *Abdul Aziz v Masum Ali* (1914) 36 All 268, 23 I C 600. Cp *Re Hudson* (1885) 33 W R 819 (claim in administration suit for unpaid instalments of testator's promised subscription, with allegation of expense and liabilities incurred on the faith thereof, treated as unarguable).

(e) *Jiban Krishna Mullick v Nirupama Gupta* (1926) 53 Cal 922. 96 I C 846,

A I R 1926 Cal 1009.

(f) The meaning of this rule seems to be that the matter of the consideration must be given, done, or suffered by the promisee himself or, if by a third party, at the request and by the procurement of the promisee, and as the agreed equivalent for the promise, and, with this meaning the rule seems to import no more than is necessarily implied in the conception of a consideration as an essential part of the agreement. Leake, *Law of Contracts* 7th ed (1911) p 449.

(g) 2 Lev 210.

as a result the estate with the timber descended to the son as the heir-at-law. The ground of the decision was that, having regard to the near relationship between the plaintiff (daughter) and the party from whom the consideration moved (father), the plaintiff might be considered a party to the consideration. That is to say, a stranger to the consideration could, by construction of law, be regarded as a party to it, if he was closely related to the person from whom the consideration actually proceeded. But this decision is no longer law in England, and was finally set aside by *Tueddle v Atkinson* (h). In that case, decided in 1861, an agreement was entered into between the respective fathers of a husband and wife that each should pay a sum of money to the husband, and that the husband should have full power to sue for such sums. After the death of both the contracting parties the husband sued the executors of the wife's father upon the above agreement, but the action was held not to be maintainable. The husband was a stranger to the consideration, and the plea of nearness of relationship to the contracting parties was regarded as of no consequence. As to *Dutton v Poole*, it was said that there was no modern case supporting that decision, and its authority was treated as overruled. It may now be taken as an established rule of English law that a third party cannot sue on a contract though made for his benefit, and the nearness of relationship cannot be invoked to import what may be called constructive consideration. However, *Dutton v Poole* was relied on, and *Tueddle v Atkinson* distinguished, by Innes J in *Chinnaya v Ramayya* (i) in the High Court of Madras. In that case, A, by a deed of gift, made over certain property to her daughter, with a direction that the daughter should pay an annuity to A's brother, as had been done by A. On the same day the daughter executed a writing in favour of the brother agreeing to pay the annuity. The daughter declined to fulfil her promise, and the brother sued the daughter to recover the amount due under the agreement. On behalf of the daughter it was contended that no consideration proceeded from the brother, and that he, being a stranger to the consideration, had no right to sue. Innes J held following *Dutton v Poole* (j), that the consideration indirectly moved from the brother to the daughter, and that he was, therefore, entitled to maintain the suit. *Tueddle v Atkinson* was

(h) 1 B & S 711 124 R R 610. See especially the judgment of Crompton J.

(i) (1881) 4 Mad 137.

(j) (1688) 2 Lev 210.

distinguished upon the ground that there no consideration proceeded either directly or indirectly from the husband, as he was not worse off from the non fulfilment of the promises than he would have been if they had not been made. It does not appear probable that this ingenious attempt to save the authority of *Dutton v Poole* would be supported in an English Court. In the Madras case now referred to, Kindersley J preferred, in fact, to rest his judgment upon the terms in which this section defines "consideration". In a later Madras case (k), the administratrix of the estate of a deceased person agreed to pay one of the heirs of the deceased his full share of the estate if the heir gave a promissory note for a proportionate part of a barred debt due to a creditor of the estate. The heir executed a promissory note in favour of the creditor, gave it to the administratrix, and received his full share in the estate. The note was subsequently handed over by the administratrix to the creditor. In a suit by the creditor against the heir on the note, it was held that the act of the administratrix in handing over to the heir his share of the estate without deducting any portion of the debt constituted consideration for the heir's promise to the creditors and that the creditor could recover upon the note.

In both the Madras cases the consideration proceeded from a *third party*, and therefore the suit would not have been maintainable according to the modern English law.

But though under the Act *consideration* for an agreement may proceed from a *third party*, a person not a party to the agreement cannot sue on the agreement (l), and this is clearly indicated by the provisions of sub ss (a) (b), (c) and (i) of the present section. Thus if A enters into a contract with B and the contract is made for the benefit of C, as it was in *Dutton v Poole* this cannot confer a right of action on C. In this connection it is important to observe that in both the Madras cases cited above the agreement sued upon was *between the plaintiff and the defendant*, though the consideration in either case proceeded from a third party. This view has been recently emphasized by the High Court of Madras and other High Courts. It has accordingly been held that where A mortgages his property to B, part of the

(l) *Samuel v Ananthanatha* (1883) 8 Mad 351.

(k) *Shankar v Umabai* (1913) 37 Bom 471 at p 479, *Mannath v Thaketh* (1918) 34 Mad 1 J 193, 196 200. See

also *Jamna Das v Pam Aular* (1912) 1 R 39 I A 7 34 All 63 *Uti Lanku Menon v Dharmon Achan* (1916) 41 Mal 488.

consideration for the mortgage being B's promise to A to pay C the amount which A owed to C, C, not being a party to the contract, cannot sue B for the payment (m). Similarly, it has been held that where a policy of insurance is effected by the assured on his own life, and the policy is expressed to be for the benefit of his wife, the wife, not being a party to the contract of assurance, is not entitled, in cases not governed by the provisions of the Married Women's Property Act, 1874, to sue the insurance company on the policy unless the policy is assigned in writing as provided by Transfer of Property Act, 1882, s 130, or a trust has been declared by the assured as provided by the Indian Trusts Act, 1882, s 5 (n). Upon the same principle where a lease contained a stipulation that the lessee would pay to the zamindar zamindari dues which were payable by the lessor to the zamindar, it was held that the zamindar, not being a party to the lease, was not entitled to sue the lessee under the terms of the lease (o). So, where a man insures his life expressly for the benefit of his widow, this gives her no lien upon the policy moneys in preference to his creditors (p).

But where a contract between A and B is intended to secure a benefit to C as a *cestui que trust*, C may sue in his own right to enforce the trust. And this seems to be the principle underlying the decision of the Judicial Committee in *Ahuja Muhammad Khan v Husain Begam* (q). In that case C sued her father in law, A, to recover arrears of certain allowances called *kharch* & *pandan*, payable by A to C under an agreement made between A and C's father prior to and in consideration of C's marriage with A's son, D. Both C and D were minors at the date of the marriage. The agreement created a distinct charge in favour of C on certain immovable property belonging to A for the payment of the allowance. It was contended on behalf of A, on the authority of *Tweddle v Atkinson* (r), that C could not sue upon

(m) *Iswaram Pillai v Sonneraru* (1913) 38 Mad 753, *Kasturamma v Venkatasurayya* (1915) 29 Mad L J 538.

(n) *Shankar v Umabai* (1913) 37 Bom 471. The parties to the suit in this case were Hindus and it was held that the provisions of s 6 of the Married Women's Property Act did not apply to them *contra* *Balamba v Krishnaya* (1913) 37 Mad 493 [F B].

(o) *Mangal Sen v Muhammad Husain*

(1915) 37 All 115.

(p) *Krishna Lal Sadlu v Pramila Bala Das* 55 Cal 1315, 114 I C 658, A I R 1928 Cal 518, the principle is strongly reaffirmed. *Cp* *Mittar Sain v Data Pam* (1925) 24 All L J 185, 205 90 I C 1000, A I R 1926 All 194.

(q) (1910) 32 All 410, L R 37 I A 152, on appeal from (1906) 29 All 151.

(r) 1 H & S 393, 124 R R 610 cited on p 20 above.

the contract, as she was no party to the agreement. But this contention was overruled, and the suit was decreed. As to *Tueddle v Atkinson*, their Lordships said that it was a case of an action of assumpsit, and that the rule of common law on the basis of which it was dismissed was not applicable to the facts and circumstances of the case before them, as the agreement executed by A specifically charged immovable property for the allowance which A bound himself to pay to the plaintiff, and the plaintiff was the only person beneficially entitled under it. Their Lordships added that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or assignments entered into in connection with such contracts (s).

The principle of the Privy Council decision was followed by the High Court of Calcutta in a case in which the facts were somewhat peculiar (t). In that case A advanced Rs 300 to B on the security of a *pattah* relating to immovable property and deposited with him by B. B then transferred by a registered *labala* all his property, movable and immovable, to C for a sum of Rs 2,000. This Rs 2,000 was not all paid in cash, but there was a provision and declaration in the *labala* that out of this consideration money of Rs 2,000, the sum of Rs 300 due to A should be paid by C. A sued C for Rs 300, basing his claim upon the *labala*. It was found that there was *no agreement* between A and C for payment of Rs 300 by C to A (u), but that on the very day on which the *labala* was executed C acknowledged the obligation to pay Rs 300 to A, that the acknowledgment was communicated to and accepted by A, and that as a result of this the *pattah*, which was erroneously believed by the parties as constituting a

(s) *Page v Cox* (1852) 10 Ha 163, 90 R R 314, is an English case really of the same class. As to possible extension in this direction, see an ingenious speculative article by Prof Corbin of Yale, *Contracts for Benefit of Third Persons*, L Q R xlv: 12.

(t) *Debnarayan Dutt v Chunulal Ghose* (1914) 41 Cal 137, 20 I C 630, see *Jiban Krishna Mullick v Arupama Gupta* (1926) 53 Cal 922, 925, 96 I C 846,

A I R 1926 Cal 1009, and dist *Krishna Lal Sadhu v Pramila Bala Das*, (1928) 55 Cal 1315, 114 I C 653, A I R 1928 Cal 518, *Hashmatmal v Prabhdas* (1928) 114 I C 111, A I R 1929 Sind 117.

(u) It was argued in this case that there was a novation within the meaning of s 62 below, but it was held upon the facts that there was no novation.

charge (v), was handed over by A to C. Upon these facts it was held that A was entitled to recover the amount claimed from C. This decision was followed by the same High Court in a later case when there was no communication to A of the arrangement between B and C, the Court holding that the absence of communication did not make any difference in principle (w). And it seems that generally the beneficiary in a *benami* transaction may sue, joining the *benamidar* (x).

The same principle has been applied by the Courts of India to cases where a provision is made for the maintenance of female members of a Hindu family on a partition of the joint family property between the male members. Thus where A and B, two Hindu brothers, divided the family property between them, and agreed at the time of partition that they should contribute Rs. 300 in equal shares, and invest the sum on the security of immovable property and pay the interest towards the maintenance of their mother, it was held that the mother, though she was not a party to the contract, was entitled to sue her sons to have that amount invested in her favour (y). Similarly, where on a partition between a Hindu son and his father it was arranged that the father should remain in possession and management of the share of the property allotted to the son and maintain the son's wife and his children out of it, it was held that the wife, though not a party to the arrangement, was entitled to sue the father for the maintenance of herself and her children (z). The wife and children, though not named as parties to the contract, possessed an actual beneficial right which placed them in the position of *cestui que trust* under the contract (a). "Though the plaintiffs are not named parties to the contract yet they are not in that sense strangers to the consideration of the contract so as to prevent them from suing on it in their own name as to such part as is for

(v) The case was from the Mufassal where a mortgage by deposit of title deeds is not recognised by law. See Transfer of Property Act, 1882, s. 59.

(w) *Dwarika Nath v. Priya Nath* (1917) 22 C. W. N. 279, 36 I. C. 792, see *Deb narayan Dutt v. Chunilal Ghose* (1914) 41 Cal. 137, at p. 141, 20 I. C. 630.

(x) *Arel Singhara Jya v. Arel Subh Jya* (1921) 47 Mad. L. J. 517, 84 I. C. 962, A. I. R. 1921 Mad. 861.

(y) *Shruppu Ammal v. Subramaniam*

(1909) 33 Mad. 238. *Arumuga Gounden v. Chinnammal* (1911) 21 Mad. L. J. 918, *Achal Singh v. Fateh Chait* (1922) 20 All. L. J. 708, 68 I. C. 778.

(z) *Rakhmabai v. Corind* (1904) 6 Bom. L. R. 421.

(a) *Ganij v. Canij* (1885) 30 Ch. D. 57 (a negative decision). We are not aware that in England the doctrine has ever been extended beyond marriage settlements.

their benefit and on their behalf" (b) Similarly where a provision is made for the marriage expenses of a female member of a Hindu family on a partition of the joint family property between the male members, the female member is entitled to sue the parties to the partition deed to enforce the provision in her favour (c)

**Past consideration**—In the same clause the words "*has done or abstained from doing*" call for special attention. They declare the law to be that an act done by A at B's request, without any contemporaneous promise from B, may be a consideration for a subsequent promise from B to A. Now, the general principle of the common law is that in the formation of a contract the consideration is given and accepted in exchange for the promise. Hence the acceptance of the consideration and the giving of the promise must be simultaneous, and in order to have the effect of binding the party making it, a request must be the offer of a promise in return for some consideration which offer will become a promise (if not meanwhile revoked) (d) if and when the consideration is furnished as requested. Thus the consideration must always be present at the time of making the promise, and there is no such thing as a past consideration. If a service is rendered without any immediate promise or understanding that it is to be recompensed, it is a merely gratuitous act having no legal effect except such transfer of property or the like as may be contained in the act itself. If there be such a promise, express by words or tacit by understanding to be inferred from the circumstances, there is at once an agreement, in which, if the recompense be not specified, the promise is to give such reward as may be found reasonable. A subsequent promise specifying the reward will not make an obligation where there was none before, but will show what the parties thought reasonable, and there is generally no reason why the parties' own estimate, in a matter which concerns only themselves, should not be accepted. Such a promise "may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered" (e). In many common circumstances the fact of service being rendered on request is

(b) Per Green J in *Blackwell & Co v Jones & Co* (1870) 7 Bom H C O C 144 at p 148

(1914) 38 Mad 788 24 I C 943

(d) As to revocation, see p 41 below

(e) Bowen L J, *Re Case's Patents*

(c) *Sundararaja v Lakshmiammal*

[1892] 1 Ch 104, 115

ample evidence of an understanding that it was to be paid for according to the usual course

The use of the perfect tense in the clause now under consideration embodies in the law of British India the exception to the general rule which is supposed to have been made by the seventeenth century case of *Lampleigh v. Brathwaite* (A D 1615) (f). There it was allowed that in general a service rendered without any agreement for reward at the time will not support a subsequent promise of reward—"a mere voluntary courtesy will not have (g) a consideration to uphold an Assumpsit"—but it was said that if the service was "moved by a suit or request" of the promisor, the promise "couples itself with the suit before," or, as we should now say, is held to relate back to the original request, and accordingly is deemed to be made on good consideration.

It would seem that this fiction was really needless, and that the true account of such cases was given by Lord Bowen (following an earlier dictum of Erle C J) in the passage above cited. Our Act has adopted the doctrine of *Lampleigh v. Brathwaite* in its current form. We shall come to another exception from the general principle in s 25, sub s (2), below. The manner in which the law of Consideration is split up between s 2 and ss 10, 23, 24, and 25, and the discrepancy of style already noticed in the Preface, do not conduce to certainty in interpreting the intention of the Act as a whole on the subject.

Indian Courts have here followed, as they were bound to do, the terms of the Act. In *Sindha v. Abraham* (h), the plaintiff rendered services to the defendant at his desire expressed during his minority, and continued those services at the same request after his majority. The question arose whether such services constituted a good consideration for a subsequent express promise by the defendant to pay an annuity to the plaintiff. The agreement was one to compensate for past services, and it was held that it could be enforced, as the services formed a good consideration within the meaning of this section. The Court was of opinion that the services were intended to be recompensed, though the nature and the extent of the proposed recompense were not fixed until the agreement sued upon was executed by the defendant. If so, there was a contract for reasonable recompense when the services

(f) Hob 105, 1 Sm L C 141. The defendant's name is often miswritten in various ways in modern books.

(g) Sic. One would expect make (h) (1830) 20 Bom 755 cf (1919) 20 Bom L R 441

were rendered, and the decision might have been put on that ground alone. It was chiefly rested, however, on the ground that, under the words of the present sub section, *services already rendered* at the desire of the promisor and such *services to be rendered* stood upon the same footing. It would seem that, under the Act, the decision must have been the same on this ground even if the services were rendered at the time gratuitously, though at the desire of the defendant. It was also said that if the services had been rendered without the desire of the defendant the case would be within s. 25 of the Act (see below). As to the conditions of suing in respect of services rendered by the plaintiff voluntarily without any request from the defendant, see s. 25 of the Act. It must be noted here that neither that section nor the clause now before us will enable a person who has purported to bind himself, when not competent to contract (s. 11), to repayment of a loan, to bind himself to it by a new promise when he is competent (i).

**“Or does or abstains from doing” : Forbearance as Consideration.**—The essence of consideration is that the promisee takes on himself some kind of burden, or “detriment,” as the English authorities call it. Where the consideration is a present performance and not a promise (the only case now before us, promise as a consideration will be dealt with under the following words of this sub section), the detriment may consist either in actually parting with something of value, or in undertaking a legal responsibility, or in foregoing the exercise of a legal right. It is not common experience that the exercise of one's legal rights is always profitable, nevertheless that which the law deems worthy of its protection must be presumed to be of some value. Thus the performance which constitutes a consideration may be negative as well as positive, provided that the promisee's abstinence from exercising a right was undertaken at the request of the promisor. There need not be a total abandonment of the right, or an undertaking to suspend it for a definite time. Such an undertaking, if it exists, is of course not a performance, but a promise, and then the contract is formed by mutual or reciprocal promises (sub s. (f), below). The class of cases now before us is that in which the defendant has requested the plaintiff to forbear the enforcement of a claim against him, and has offered a

(i) *Suraj Narain v Sukhu Ahir* (1928) 51 All 164, 112 I C 159, A I R 1928 All 440. The words are in themselves not clear, but if a merely void transaction could thus be in effect ratified, the intention of the Act would be frustrated.

new promise in return, and the plaintiff, without any express acceptance of the defendant's terms, has in fact forbore for an appreciable time. Here the defendant's offer to pay or give security, or as the case may be (j), is accepted by the performance of its conditions (see s 8, p 55, below), and that performance is a good consideration for the defendant's promise. And where the defendant has made an offer to pay in consideration of forbearance, with some other alternative offer, the plaintiff's forbearing to sue in fact is a sufficient acceptance of the first alternative (k). A request to forbear suing or other proceedings, not specifying any length of time, is understood to be a request of forbearance for a reasonable time (l), and this is in fact a common case. If it is asked at what moment the proposal conveyed by such a request becomes a promise, the answer is that it does so whenever the other party has in fact forbore his rights for a time which the Court considers long enough to amount to a reasonable compliance with the request. This appears to be a question of fact depending on all the circumstances, for which no general rule can be laid down. No great difficulty is found, so far as we are aware, in dealing with it in practice. It will be found on examination that in many of the cases where forbearance to sue is said to be the consideration for a promise, that which is really given and accepted as consideration is a promise to forbear suing either for a definite time or for a reasonable time according to the circumstances, which promise may be express or inferred from the transaction as a whole (m). Such cases really belong to the following head of contracts by mutual promises. Sometimes it is not easy to say whether, on the facts of a particular case, the consideration is actual forbearance or an agreement to forbear, in other words, whether the promise sued upon was exchanged for a promise of forbearance, or

(j) See *Alliance Bank v Broom* (1864) 2 Dr & S 289 as a good example of this class. See also *Fanindra Narain v Kacheman Bibi* (1917) 45 Cal 774, 41 I C 673, 22 C W N 188.

(k) *Widby v Elgre* (1875) L R 10 C P 497.

(l) *Alliance Bank v Broom*, note (j). See *Fullerton v Provincial Bank of Ireland* [1903] 1 C 309, 313, 314, *Glegg v Bromley* [1912] 3 K B 474, 481. See also *Mohes Chandra v Pajani Kantia*

(1915) 22 C L J 235, 31 I C 29, *Fanindra v Kacheman* (1917) 22 C W N 188, 41 I C 673, *Srinivasa Paghava Aiyangar v Ranganatha Aiyangar* (1918) 36 Mad L J 618, 51 I C 903. *Anant Krishna Modak v Saraswati Lalmanab Shetty* (1928) 30 Bom L R 709, 111 I C 506, A I R 1928 Bom 316.

(m) For example *Imin Chind v Guni* (1929) 119 I C 766, A I R 1929 Lah 466.

was an offer to be accepted by forbearance in fact, and became a promise when its condition was fulfilled by the plaintiff's forbearance for the specified time, if any, or otherwise for a reasonable time (n)

**Compromise.**—The most usual and important kind of forbearance occurring in practice is that which is exercised or undertaken by way of compromise of a doubtful claim. It is a question of some importance within what limits the abandonment or compromise of a disputed claim is a good consideration. But this seems to belong not to the definition of Consideration, but to the substantive law declared in s. 25 of the Act. We shall therefore deal with it under that section.

**Apparent forbearance when really an act.**—Actual performance is sometimes apparently passive. A trader exposes his goods for sale, the price being marked or otherwise well known. A customer comes in, takes the object he wants, and gives his name to the trader. The case is common enough. Here a captiously literal person might say that the consideration on the trader's part is forbearing to interfere with the customer's action. But what we do say, both in law and in common sense, is that the seller, by authorising the buyer to take the goods within his reach, in fact sells and delivers them by the buyer's own hand, and the act, though mechanically the buyer's, is in substance the seller's. This remark is needed only when the sale is on credit. If ready money is expected and given, there is no promise at all in the transaction, and therefore no contract, see the commentary on the next following words.

**“Or promises to do or to abstain from doing something” : Mutual Promises.**—These words, supplemented by sub ss (e) and (f), convey in a somewhat indirect and inconspicuous manner the extremely important proposition that a contract may be formed by the exchange of mutual promises, each promise being the consideration for the other. In this case neither promise is of any value by itself, but each of them derives its value from the exchange which makes them both binding. This effect of mutual promises is not a logical deduction from the general notion of consideration (o), but a positive institution of law required by the convenience of business in civilised life. In many archaic systems of law there is no obligation to perform a promise until there has been

(n) See per Bowen L. J. in *Miles v New Zealand Alford Estate Co* (1886) 32 Ch. D. 266, 289.

(o) For fuller theoretical exposition see Pollock, *Principles of Contract*, 9th ed. 193.

performance or at least some act done towards performance on the other side. The widespread custom of giving something by way of earnest "to bind the bargain" is a relic of this view.

A consideration which consists in performance (or so far as it consists in performance) is said to be executed. If and so far as it consists in promise, it is said to be executory. Some writers, especially in America (p), speak of a contract in which the consideration on one side is executed as unilateral, and of a contract in which it is executory on both sides as bilateral. This terminology is concise and convenient, but is not at present commonly used in England. It is obvious that the consideration cannot be wholly executed on both sides. For where performances, and performances only, are exchanged, of which a sale of goods over the counter for ready money is a familiar example, nothing remains to be done by either party, and there is no promise at all and nothing for the law to enforce (q).

The proposal to give a promise for a promise is accepted by giving the promise asked for, and thereupon, if there be no special ground of invalidity, the two parties are both bound, each being both promisor and promisee. It does not seem necessary or useful or indeed true to say that the promise of the party who accepts has ever been a proposal, though the language of sub-s. (b) does not seem to recognise the existence of promises which have not passed through that stage. Still it is true that, but for the counterpromise or "reciprocal promise" as the Act has it, neither party's "signification of willingness" could become a promise within the definition of the Act; and in this sense we may say, if we please, that the acceptance of an offered promise, by giving the reciprocal undertaking asked for, has itself the nature of a proposal, though it becomes a promise in the act of utterance, and there is no moment at which it exists merely as a proposal. But it does not appear that anything of practical importance can turn on this.

**Promises of Forbearance.**—An actual forbearance to exercise a right may be a good executed consideration, provided it be at the promisor's request. So a promise of forbearance may be a good executory consideration. The validity of such considerations, as dis-

(p) See Langdell, Summary of the Law of Contracts, s. 183; Harriman on Contracts, *passim*.

lateral promise, e.g., a warranty on sale, does not affect the general truth of this statement

(q) The possible existence of a col-

inct from their formal definition, will be spoken of, as above mentioned, under s 25

"Such act or abstinence or promise is called a consideration for the promise": Further requirements.—It will be observed that, according to the terms of the definition it is only required that something—no matter what—should have been done, forborne, or promised at the request of the promisor. We shall find however, that in some cases expressly provided for by the Act, and in others apparently not so provided for, but well known in the Common Law, and still recognised in Indian practice the legal effect of consideration in making promises binding is withheld from acts, forbearances, and promises which are within the terms of the definition. English lawyers are accustomed to say, in some at least of such cases, that there is no consideration. This way of speaking would seem to be excluded by the Act. One would expect the Act to say somewhere that in order to have legal effect, a consideration must not only be something which the promisor asked for and got, but must be "good" or "valuable", that is to say, something which not only the parties regard, but the law can regard, as having some value (r). This is a fundamental rule in the Common Law. Had the Act abrogated it, the consequences would have been extensive, but it seems to be beyond doubt that such was not the intention, and that the silence of the Act cannot be taken as altering the English law as it stood settled in British India (s). The principle may be broadly expressed thus. The law will not enforce a promise given for nothing, and if it is apparent to the Court on the face of the transaction that an alleged consideration amounts to nothing (not merely to very little), then there is no foundation for the promise, and we say either that there is not any consideration or that there is an "unreal consideration". The Act does say in s 10 that agreements are contracts, *i.e.*, enforceable, if they are (amongst other conditions) made for a lawful consideration. In s 23 it is declared that certain kinds of consideration are not lawful. In s 25 agreements made without consideration are declared (special exceptions excepted) to be void. It is not anywhere stated in terms that consideration is not lawful, or otherwise not sufficient, if it is not

(r) *Good* consideration was in fact required by the original draft of the Act (s 10)

(s) Dr Whitley Stokes's criticism of the language (Anglo Indian Codes i 497) was justified but his fears have not been

“good” or “valuable” in the sense which those terms bear in English law. Further explanation is reserved for the commentary on the sections last mentioned.

**Sub-ss (e) to (j) : Agreement and Contract**—The group of sub-ss (e) to (j) may be considered together. By sub-s (e) an agreement is either a promise or a group of promises (i), and, therefore, it would seem that an executed consideration is not reckoned as part of the agreement. This is not according to the current use of language, which treats an agreement as an act of both parties, whether a legal obligation is incurred by one or both of them. A unilateral contract is not the less a transaction between two parties to which both must contribute something. It would not be difficult, however, to find arguments for the language of the Act if required. Sub-s (f) agrees with common usage, except that the adjective “mutual” is more common in English books.

The distinction between “agreement” and “contract” made by sub-s (h) is apparently original, it is convenient, and has been adopted by some English writers. It should be strictly observed in India, though lapses such as “void contract” sometimes occur. The conditions required for an agreement being enforceable by law are contained in Chap. II of the Act, ss 10 sqq (pp 64 sqq, below), where it will also be seen that the absence of any such condition makes an agreement void, and certain defects will make a contract voidable. The duties of parties to a contract are set forth in Chap. IV of the Act. The manner in which contracts are, if necessary, enforced belongs to civil procedure.

For technical reasons, the language of sub-ss (g) and (i) would not be accurate in England, it would be useless to dwell on this here. The state of things really indicated by sub-s (i) is that one of the parties (or possibly more) can at his option maintain the contract, or resist its enforcement, or take active steps to set it aside. When rescinded by a party entitled to rescind, it becomes void. Nevertheless it is in the first instance a contract, being valid until rescinded. A contract obtained by fraud is the typical example of a voidable transaction. See ss 19, 19A, 39, see also ss 53, 55. The definition was not intended to alter, and does not alter, the substantive law (u)

(i) See *Abayastaram v Trimbal Nuni*  
*espally* (1903) 28 Bom 66 at p 72

(u) *I g* a contract is not vitiated by  
 a clause conferring an option on one



sufficient Otherwise an unexecuted intention to communicate something, or even an unsuccessful attempt, cannot be treated as amounting to a communication, much less can a mere mental act of assent have such an effect in any case (v)

**Communication of special conditions**—In recent times there has been a series of cases in which the first question is whether the proposal of special terms has been effectually communicated This arises where a contract for the conveyance of a passenger, or for the carriage or custody of goods, for reward, is made by the delivery to the passenger or owner of a ticket containing or referring to special conditions limiting the undertaker's liability, and nothing more is done to call attention to those conditions English authorities have established that it is a question of fact whether the person taking the ticket had (or with ordinary intelligence would have) notice of the conditions or at any rate that the other party was minded to contract only on special conditions to be ascertained from the ticket In either of these cases his acceptance of the document without protest amounts to a tacit acceptance of the conditions, assuming them to relate to the matter of the contract, and to be of a more or less usual kind (w) But he is not liable if the ticket is so printed, or delivered to him in such a state, as not to give reasonable notice on the face of it that it does embody some special conditions (x) In determining these questions the class of persons to whom the special conditions are offered, and the degree of intelligence to be expected of them, may properly be taken into account (y)

(v) *Brogden v Metrop R Co* (1877) 2 App Ca at pp 691, 692 per Lord Blackburn and see *Felthouse v Bindley* (1862) 11 C B N S 869 132 R R 784 135 R R Preface vii judgment of Willes J

(w) See *Gibaud v G E R Co* [1900] 3 K B 639

(x) In *Henderson v Stevenson* (1875) L R 2 Sc A D 470 where an endorsement on a steamboat ticket was not referred to on its face and *Richardson v Rowntree* [1894] A C 217 where the ticket was folded up so that no writing was visible without opening it a finding of fact that the passenger knew nothing

of any conditions was supported The correct form of putting the question of fact was laid down by the C A in *Parker v S E R Co* (1877) 2 C P Div 416 See *Madras Railway Co v Govinda Patil* (1898) 21 Mad 172 174 and for a general summary of the law *Hood v Anchor Lane* [1918] A C 837 where both the contract and a notice on the envelope enclosing it pointedly called attention to the conditions Inability to read is no excuse *Thompson v L M & S R Co* [1930] 1 K B 41 C A

(y) See Lord Ashbourne's remarks in *Richardson v Rowntree* last note

So far as we know, there is only one Indian case bearing directly on the subject. The plaintiff in that case (z) purchased of the defendant company a ticket by steamer, which was in the French language. Towards the top of the ticket were words to the effect that "this ticket in order to be available, must be signed by the passenger to whom it is delivered." At the foot of the ticket there was an intimation in red letters that the ticket was issued subject to the conditions printed on the back. One of those conditions was that the company incurred no liability for any damage which the luggage might sustain. The vessel was wrecked by the fault of the company's servants, and the plaintiff's baggage was lost. The plaintiff sued the defendant company for damages. The ticket was not signed by him, and he stated that he did not understand the French language, and that the conditions of the ticket had not been explained to him. It was held that the plaintiff had reasonable notice of the conditions, and that it was his own fault if he did not make himself acquainted with them. *Henderson v Stenerson* (a) was distinguished on the ground that there the ticket did not disclose on the face of it that there were any conditions on the back, and the plaintiff had no notice of any such conditions. As to the absence of the plaintiff's signature, it was held that the clause requiring the passenger's signature was inserted for the benefit of the company, and that they might waive it if they thought fit. The decision seems also to imply that a French company is entitled to assume that persons taking first-class passages either know French enough to read their tickets or, if they do not ask for a translation at the time, are willing to accept the contents without inquiry. This seems reasonable enough in the particular case. *Quare*, what presumption is there, if any, as to educated persons, European or otherwise, in British India being acquainted with any particular language?

**Incorporation of prospectus in a policy of assurance**—The question of the effect to be given to the prospectus of a company which was incorporated by reference in a policy of life assurance arose some time ago in a Madras case (b) in connection with the onus of proof of age of the assured. In the course of the judgment, Bhashyam Ayyangar J.

(z) *Mackillican v Compagnie des Messageries Maritimes de France* (1880) 6 Cal 227

(b) *Oriental Government Security Life Assurance Co., Ltd v Narayana Chari* (1901) 25 Mad 183 205, 206

(a) (1875) 1 R 2 Sc & D 470



(b) B accepts A's proposal by a letter sent by post

The communication of the acceptance is complete —

as against A, when the letter is posted,

as against B when the letter is received by A

(c) A revokes his proposal by telegram

The revocation is complete as against A when the telegram is despatched

It is complete as against B when B receives it

This section is really in the nature of an interpretation clause to s 5 and might, perhaps, have more conveniently followed it

**Agreement between parties at a distance**—No difficulty arises on the first paragraph (c) Whether a proposal has or has not come to the knowledge of the person to whom it was made is purely a question of fact The rest of the section is intended, as shown by the illustrations, to meet the questions raised by the formation of agreements between parties at a distance It has done this, as regards acceptance by enacting (in combination with s 5) that for a certain time—namely, while the acceptance is on its way—the receiver shall be bound and the sender not The proposal becomes a promise before it is certain that there is any consideration for it This can be regarded only as a deliberate and rather large departure, for reasons of convenience, from the common law rule which requires the promise and the consideration to be simultaneous No such departure has been found necessary in England The case of an acceptance being “put in a course of transmission to” the proposer, but failing to reach him, is not expressly dealt with It seems to result from the language of the second paragraph that the proposer must be deemed to have received the acceptance at the moment when it was despatched so as to be “out of the power of the acceptor,” and that accordingly it becomes a promise on which the acceptor can sue, unless some further reason can be found why it should not If the consideration on the acceptor's part was not promise but performance—for example, the sale of goods despatched at the proposer's request without previous negotiation—the failure of consideration may supply such a reason in the case proposed The Act certainly does not say that the intending purchaser must be deemed

(c) Transactions conducted in a summary manner, as by telegraph, may raise doubt as what according to the usual course of business, the communication implied Such questions are really of

construction—e.g., *Radha Kanta Dass v Baerlein Bros* (1929) 117 I C 540 56 Cal 118 32 C W N 1101, A I R 1929 Cal 97

to have received goods which have never arrived, it says at most that he must be deemed to have been aware of their despatch. But if the consideration on the acceptor's part was a promise, it would seem that the proposer cannot say he has not received that consideration, for he cannot say that the acceptance has not been communicated to him, and there is no difference between having the communication of a promise and having the promise itself. Consequently, where the agreement is to consist in mutual promises, a binding contract appears to be formed by a letter of acceptance despatched in the usual way, even if it does not arrive at all, unless the proposal was expressly made conditional on the actual receipt of an acceptance within a prescribed time, or in due course, or unless the acceptor sends a revocation as provided for by the latter part of the section and explained by illustration (c). This last qualification is probably, though not certainly, a departure from English law. Apart from the question of a possible revocation, the total result, on the words of the Act, is in accordance with the existing English authorities. Those authorities, however, are of later date than our Act, and in 1872 the current of opinion was rather the other way. It seems uncertain whether the framers of the Act really omitted to consider the case of an acceptance not arriving at all, or meant it to be an implied exception, on the ground that the want of any final consent between the parties (see s. 10) would prevent the formation of a contract, or how otherwise. The draft of 1866 appears to have assumed that actual communication was necessary (f). When the proposal and acceptance are made by letters the contract is made at the time when and the place where the letter of acceptance is posted (g).

**English rules**—The rules as now settled in England are as follows—

“A person who has made an offer must be considered as con-

(f) 3 A proposal to enter into a contract may be retracted or the terms of it altered by the party making it at any time before it is accepted.

*Explanation*—A proposal is said to be accepted when an expressed acceptance of it has been communicated to the proposer or when a letter of acceptance is posted or a telegraphic message delivered at the proper office and the acceptance by letter or telegram is not

cancelled by some communication which reaches the proposer before or at the same time with the letter or telegram of acceptance or when acceptance is to be inferred from the circumstances of the case.

(g) *Amisette's Digest of the Law of Contract* (1903) 2<sup>nd</sup> Ed. 16. English authorities so far as it goes set the same effect.

nuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn (h) In other words, the revocation of a proposal is effectual only if actually communicated before the despatch of an acceptance, and the time when the revocation was despatched is immaterial (i) But where an acceptance, without notice of the offer being revoked, is despatched in due course by means of communication, such as the post, in general use and reasonably within the contemplation of the parties, the acceptance is complete from the date of despatch, notwithstanding any delay or miscarriage in its arrival from causes not within the acceptor's control (j) It seems (k) this is independent of the rule that, if the proposer of an agreement has prescribed or authorised any particular mode of communicating acceptance (*cf* s 7, sub s 2), he cannot dispute the sufficiency of that mode, and must take any risks of delay or miscarriage attaching to the acceptor's action in conformity with the request or authority

A letter of acceptance misdirected by the acceptor's fault cannot be deemed to have been effectually put in a course of transmission to the proposer (l), this case was properly distinguished by the Allahabad High Court from that of an insufficient address furnished by the proposer himself (m) There the proposer's own want of care obviously cannot extenuate, but will if possible aggravate, the risk imposed on him by the general rule of law

Whether a particular letter or writing has been posted, delivered, or actually received by the addressee, is a question of fact having no more to do with the law of contract than any other matter of fact which

(l) Lord Herschell in *Henthorn v Fraser* [1892] 2 Ch 27 31 confirming *Eyrne v Van Tienhoven* (1880) 5 C P D 344

(i) It is literally possible to read the words of s 4 of the Act par 3 as giving only one chance of sending a revocation so that if a man first sends a written acceptance by a slow ship then sends a written revocation by a faster ship and then returns to his first mind and confirms the acceptance by a telegram arriving before either letter the revocation is operative and the confirmation cancelling it is not But this cannot be

seriously entertained and seems sufficiently excluded by the terms of s 3

(j) *Henthorn v Fraser* note (h) above *Household Fire etc Insurance Co v Grant* (1879) 4 Ex D 216

(k) *Henthorn v Fraser*

(l) *Pam Das v Official Liquidator Cotton Ginning Co Ltd* (1887) 9 All 366 385

(m) *Townsend's Case* (1871) L R 13 Eq 145 Several dicta in this case are founded on authority since overruled, the decision is good law though it would now be put on shorter grounds

it may be needful to prove in order to establish or contradict the formation of any kind of contract (*n*)

It is not thought useful for Indian purposes to enter upon the history of the English doctrine, or to discuss the earlier cases, whose results, so far as not overruled, are embodied in later decisions (*o*)

**Revocation arriving before Acceptance**—One point remains unsettled in England. It has never been decided whether, a letter of acceptance having been despatched by post, a telegram revoking the acceptance and arriving before the letter is operative or not. A negative answer seems to be required by the reasoning of the English decisions (*p*). If it can be said that every acceptance in writing is subject to an implied condition that it may be cancelled by a revocation arriving sooner or at the same time, it might as easily be held that every proposal expecting an answer by letter includes a condition that the answer shall actually be received in due course. But this suggestion has been definitely rejected.

In British India, however, such a revocation is made valid by the express terms of ss 4 and 5 of the Act (*q*)

**Statutory consents**—The validity of consents required by special statutory provisions, and revocations thereof, is governed by the terms of the statute, and, in case of difference, not by this or the following section (*r*)

**5.—A proposal may be revoked at any time before the**

Revocation of communication of its acceptance is complete  
proposals and ac  
ceptances as against the proposer, but not afterwards

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards

(*n*) Cf Evidence Act, ss 16 and 114

(*o*) See Appendix to Pollock, Principles of Contract 9th ed p 728

(*p*) See especially the judgment of Thesiger L J in *Household Fire Insurance Co v Grant* 4 Fx Div at p 222, 144 Ch D 137

(*q*) The Indian rule agrees with a

Scottish decision which is apparently still followed in Scotland, *Countess of Dunmore v Alexander* (1830) 9 Shaw & Dunlop 109. This is under a different system of law.

(*r*) *Lingo Farys Kulkarni v Secy.ary of State* (1925) 111 I C 278, 30 Bom L R 570, A I R 1925 Bom 201

*Illustration*

A proposes, by a letter sent by post, to sell his house to B

B accepts the proposal by a letter sent by post

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards

**Revocation of Offers**—It is implied in this section that the proposer of a contract cannot bind himself (unless by a distinct contract made for a distinct consideration) to keep his offer open for any definite time, and that any words of promise to that effect can operate only for the benefit of the proposer and as a warning that an acceptance after the specified time will be too late (s 6, sub s 2). Such is undoubtedly the rule of the Common Law. The reason is that in undertaking to keep the offer open for a certain time is a promise without consideration, and such a promise is unenforceable. A gives an undertaking to B to guarantee, for twelve months, the due payment of M's bills, which may be discounted by B at A's request. This is not a binding promise, but a standing proposal which becomes a promise or series of promises as and when B discounts bills on the faith of it. A may revoke it at any time, subject to his obligations as to any bills already discounted. "The promise"—or rather offer—"to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend" (s). Z offers to take A's house on certain terms, an answer to be given within six weeks. A within that time writes Z a letter purporting to accept, but in fact containing a material variation of the terms (see s 7, sub s 1, below), Z then withdraws his offer, A writes again, still within the six weeks, correcting the error in his first letter and accepting the terms originally proposed by Z. No contract is formed between Z and A,

(s) *Offord v Davies* (1862) 12 C B N S 748, 133 R R 491. The much discussed earlier case of *Cooke v Oxley* (1790) 3 T R 653, 1 R R 783, is now received authority only so far as it decides this. See *Stevenson v McLean* (1880) 5 Q B D 346, 351. *Head v Diggon* (1828) 3 M & R 97 (in which the parties were face to face, and it is not clear whether the defendant did or

did not signify his revocation before the plaintiff signified his acceptance) cannot be taken as going farther. The reason there given is clearly wrong, for it is supposed that on the acceptance of a proposal it is necessary for the proposer to make some fresh declaration of consent, which is contrary both to principle and to all recent authority.

since A's first acceptance was insufficient, and the proposal was no longer open at the date of the second (r). Similarly a proposal to sell goods allowing eight days' time for acceptance may be revoked within the eight days unless the promise to keep the offer open was supported by consideration (u). A statutory power to make rules for the conduct of departmental business will, however, justify a local government in prescribing, among the conditions of tenders for public service, that a tender shall not be withdrawn before acceptance or refusal (v).

**Sale by Auction, etc.**—The liberty of revoking an offer before acceptance is well shown in the case of a sale by auction. Here the owner of each lot put up for sale makes the auctioneer his agent to invite offers for it, and "every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to." Hence a bidder may withdraw his bid at any moment before the fall of the hammer (w). It is common to insert in conditions of sale a proviso that biddings shall not be retracted, but it seems that such a condition is inoperative in law (x), for a one-sided declaration cannot alter the bidder's rights under the general law, nor is there any consideration for his assenting to it, even if he could be supposed to assent by attending the sale with notice of the conditions.

The English rule that a bid may be withdrawn at any time before the fall of the hammer is followed in British India (y). When the bid of an agent at an auction sale was accepted by the auctioneers *Lutchapucca* (subject to sanction of the owner of the goods), and the agent agreed thereto, it was held that this did not preclude the principals of the agent from exercising their right of retracting the bid before it was accepted by the auctioneers (z). In this case an attempt was unsuccessfully made to prove a usage of trade according to which, if a bid were accepted *Lutchapucca*, the bidder could not retract it until it had been finally accepted or refused. If such a usage were established, it would have been, no doubt, inconsistent with the terms of the present section.

(t) *Poulledge v Grant* (1828) 4 Bing 653, 29 R R 672

(u) *ScJoulank v Muthunagana Chetty* (1892) 2 Mad L J 57

(r) *Secretary of State v Bhaskar Arishnavil* (1925) 49 Bom 759, 89 I C 408, A I R 1925 Bom 485

(w) *Payne v Case* (1789) 3 T R 148.

1 R R 679

(x) Such was Lord St Leonards' opinion *Dart, V & P* 6th ed 133

(y) *Agra Bank v Hamlin* (1890) 14 Mad 235

(z) *MacKenzie v Chamroo* (1893) 16 Cal 702

But, so far as the express enactments of the Act are concerned, such a usage is saved by the last clause of s 1. It would remain to be seen whether it would not be disallowed as contrary to the general principles of the law

**Standing offers**—A writing whereby A agrees to supply coal to B at certain prices and up to a stated quantity, or in any quantity which may be required, for a period of twelve months, is not a contract unless B binds himself to take some certain quantity, but a mere continuing offer which may be accepted by B from time to time by ordering goods upon the terms of the offer. In such a case, each order given by B is an acceptance of the offer, and A can withdraw the offer, or, to use the phraseology of the Act, revoke the proposal, at any time before its acceptance by an order from B (a). Such a transaction may be reduced to a statement by the intending vendor in this form: "If you will send me orders for coal, I shall supply it to you for a period of twelve months at a particular rate." This is merely a proposal from A to B. If in reply to such a proposal, B says to A, "I agree," it does not constitute an acceptance of the proposal. An acceptance can take place only by B sending an order to A. If, however, there is an undertaking on the part of B not to send orders for coal (or whatever the goods in question may be) to any other person than A during a specified time, there is a good consideration for a promise by A to supply such coal as B may order on the specified terms and up to the specified extent. The same principle was affirmed by the Judicial Committee on an appeal from the Province of Quebec where French Canadian law, now codified, is in force. A printer covenanted to execute for the Government of the Province, during a term of eight years, the printing and binding of certain public documents on certain terms expressed in a schedule. In the course of the same year the Lieutenant Governor cancelled the agreement. The printer sued the Crown by petition of right, and it was ultimately held, reversing the judgment below, that he had no ground of action.

"The contract does not purport to contain any covenant or obligation of any sort on the part of the Crown. The respondent

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(a) *The Fungal Coal Co v Homee, Nadia & Co* (1899) 24 Bom 97, following *G v P Co v Witham* (1873) L R 9 C P 16, *Kundan Lal v Secretary of State for India* (1904) Punj Rec no 72 *Joraria Mell Champalal v Jeygopaladas Ghanshandas* (1922) 43 Mad L J 132

undertakes to print certain public documents at certain specified rates For all work given to him on the footing of the contract the Government was undoubtedly bound to pay according to the agreed tariff But the contract imposes no obligation on the Crown to pay the respondent for work not given to him for execution There is nothing in the contract binding the Government to give to the respondent all or any of the printing work referred to in the contract, nor is there anything in it to prevent the Government from giving the whole of the work, or such part as they think fit to any other printer" (b)

In another similar case in England where a town council had accepted a tender for the supply of certain goods for twelve months a Divisional Court held that a contract was formed by the acceptance of the tender (c) One of the Judges thought there was an implied obligation on the council's part not to order goods of that kind elsewhere during the term The case before the Judicial Committee which we have just mentioned was not cited Unless some sufficient distinction can be discovered in the facts (which the present writer has failed to do), it is submitted that this judgment is contrary to both principle and authority, and ought not to be followed

Advertisements of rewards and other so called "general offers" have also raised questions whether particular acts were proposals of a contract capable of being promises by acceptance or merely the invitation of proposals This will be more conveniently dealt with under s 8

## 6.—A proposal is revoked—

(1) by the communication of notice of  
Revocation how made revocation by the proposer to the other party,

(2) by the lapse of the time prescribed in such proposal for its acceptance or, if no time is so prescribed,

(b) *R v Demers* [1900] A C 103 109 I followed in a closely similar case where the real difference between the parties was of construction, *Secretary of State v Madho Pars* (1929) 10 Lah 493, A I R 1929 Lah 114  
 (c) *Cloucester Municipal Election Peti*

*tion* [1901] 1 K B 683 The point arose in a curious manner the question being whether the tradesman had an interest in a contract with the council (apart from any goods being actually ordered) which disqualified him for election as a town councillor

by the lapse of a reasonable time, without communication of the acceptance ;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance ; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

**Notice of Revocation.**—Here sub s. 1 appears to make it a condition of revocation being effectual that it shall be communicated by the proposer or (which is the same thing) by his authority. This was probably intended to correspond with the law of England, but a few years after the Act was passed the Lords Justices James and Mellish in *Dickinson v. Dodds* (d) used language apparently involving a different rule, though that case actually decided only that if an owner of immovable property makes a proposal to sell it to one man, and before that proposal is answered agrees to sell it to another, and the first, with the knowledge of this fact, then formally tenders an acceptance, the purchaser who first actually accepts has the better right to specific performance. It was not decided (though the Judges seem to have thought) that knowledge, not communicated by the proposer, that the property was sold to some one else was such a revocation of the first proposal as in itself made acceptance by the person to whom it was made impossible. Acceptance of a proposal which the proposer has made it impossible to fulfil is not necessarily unmeaning or inoperative, the fact that an obligation cannot be specifically performed is consistent with the promisor being bound to pay damages for his default. Many obligations are from the first incapable of specific performance so far as any power of the Court is concerned. It would be absurd to hold that a promisor is to go scot-free because by his own action he has reduced the possibilities of his obligation from a higher to a lower level. The reasons given for the decision in *Dickinson v. Dodds* have been freely criticised in England ; but, as the decision itself is not of positive authority in British India in a matter covered by the terms of the Contract Act, it does not seem useful to pursue the discussion here. The true principle of such cases is stated by Lang-

dell (e) "An offer to sell property will not be revoked by a sale of the property to some one else As evidence of a change of mind on the part of the offeror, such an act cannot be put higher than a letter of revocation sent to the offeree by mail, and yet it is well settled that a letter of revocation will not be operative until it is received by the offeree (f) Nor will the subsequent sale of the property to some one else constitute any legal obstacle to the continuance of the offer The original offeree and the subsequent purchaser cannot, indeed, both acquire the property, but they can both acquire a right to it as against the seller, together with the alternative right to damages, and this is all that a contract secures to one in any case" It has, indeed, been suggested by writers entitled to respect (g) that an act of the proposer inconsistent with his original intention will be operative, if it comes in any way to the knowledge of the offeree, as an act which, under s 3, "has the effect of communicating" a revocation of the proposal If this were so, *Dickinson v Dodds* would be good law in British India to the full extent of the reasons there given But, with all submission, the act of selling to one man property already offered to another cannot be itself an act which has the effect of communicating notice to that other Such notice must be the effect of some other act or event As in *Dickinson v Dodds*, a stranger may inform the original offeree that the new transaction, or some such transaction, has taken place This is no act of the party supposed to be revoking, and therefore its effect, if any, cannot depend on the words of s 3 It is perhaps needless to consider what would be the result if the first offeree in person were to overhear a conversation between the vendor and the new purchaser constituting an agreement inconsistent with the first offer We have already expressed a doubt whether the true meaning of s 3 was to ascribe the effect of communicating proposal, revocation, or acceptance, to acts done without any such intent On the whole, we are unable to follow the learned commentators to whose interpretation we have referred

**Revocation not presumed**—As Lord Justice James said, "*prima facie every contract is permanent and irrevocable, and it lies upon a*

(e) Summary of the Law of Contracts  
Boston (Mass.) 1880 s 181

(f) A cheque is not effectually countermanded by a telegram delivered at the bank on which it is drawn but not

in fact brought to the banker's notice  
*Curtice v London City & Midland Bank*  
[1908] 1 K B 297 C A

(g) Cunningham and Shephard's Indian  
Contract Act 6th ed p 25

person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination" (h) This dictum, and the Indian case cited in our note, really belong to the subject of interpretation, in cases where it is alleged that an option to determine a completed contract is conferred by the terms of the contract itself. But the principle that an intent to revoke what has once been deliberately uttered will not be lightly presumed or too readily inferred appears to be equally applicable to proposals. Moreover, the Act does not explicitly deal with interpretation anywhere. The Lord Justice went on to point out that many contracts—those of employment, agency, and the like—are by their nature not expected to be of indefinite duration. The agreement before him was an agreement for running powers between two railway companies.

**Lapse of time for Acceptance**—The rule laid down by sub s. 2 is now elementary. We have already had to cite some of the authorities which recognise it. On the point of an acceptance after the expiration of a reasonable time being too late, there is one direct English authority where it was held that a person who applied for shares in a company in June was not bound by an allotment made in November (i). In another English company case an underwriting letter contained the words "This engagement is binding on me for two months", they

(h) *Llanelli Ry and Dock Co v L & N W R Co* (1873) L R 8 Ch 942 949. Accordingly, where a contract was made between the widow of a Gayawal priest and the defendant whereby the widow adopted the defendant, a married man, as her son in order that the defendant might get his feet worshipped by the *clientele* of her deceased husband and receive emoluments from them for the benefit of himself and the widow, and the contract itself specified the circumstances under which it might be cancelled it was held that though the adoption was invalid the contract was not determinable at the mere choice of the widow so as to affect the rights

created thereby in favour of the defendant. The Court said: "We are unable to accept the suggestion that the contract in this case was a contract of service terminable upon reasonable notice. The contract itself indicates some of the circumstances under which it may be terminated and it is impossible to hold that the parties intended that the contract should be terminable merely at the option of one of the parties." *Lachma Das Mohutain v Kissen Lall* (1906) 11 C W N 147, citing *James LJ* as above.

(i) *Parnagale Victoria Hotel Co v Moncreaf* (1866) L R 1 Ex 109.

were incapable of operating as a promise, and it was held, with some doubt, that their real effect was an offer with a limit of two months for acceptance (7)

**Condition precedent to Acceptance**—As to sub s 3, it is not very easy to see what a condition precedent to acceptance means. The words (like several other of the less felicitous phrases in the Act) appear to have been borrowed without much reflection from the draft Civil Code of the State of New York, completed in 1865 and never adopted in its own State. There is nothing in the original context to throw light on them. A man proposing a contract may request either a single act, or several acts, or a promise or set of promises, or both acts and promises, as the consideration for a promise which he offers. The other party may do something obviously inconsistent with performing some or one of the things requested. This amounts to a tacit refusal, and accordingly the proposal is at an end (see p 41, above) and the parties can form a contract only by starting afresh. If the fact amounts to a refusal, there is no manifest reason for calling it failure to fulfil a condition precedent. The term is not used in this connection in English books. Everything required on the acceptor's part to complete an acceptance would rather seem to be part of the acceptance itself. This sub section does not appear to have been judicially interpreted, or indeed to have any very material effect.

**Death or insanity of proposer**—The provision made by sub s 4 is quite clear. It is a variation from English law, where on the one hand it is understood that 'the death of either party before acceptance causes an offer to lapse,' without any qualification as to notice, and on the other hand it does not seem that supervening insanity of the proposer operates as a revocation at all, since the contract of a lunatic is only voidable and not void. If an offer is addressed to a man who dies without having accepted or refused it, his executors have no power to accept it either in England or in British India. For the proposer cannot be presumed to have intended to contract with a deceased person's estate. This is very different from the case of one who accepts a proposal without knowing that the proposer is dead.

**Refusal**—The rejection of a proposal by the person to whom it is made is wholly distinct from revocation, and is not within this

section. A counter-offer proposing different terms has the same effect as a merely negative refusal; it is no less a rejection of the original offer, and a party who, having made it, changes his mind, cannot treat the first offer as still open (k).

7.—In order to convert a proposal into a promise, the

Acceptance must  
be absolute acceptance must—

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance (l).

**Certainty of Acceptance.**—The rule of the first sub-section is in itself obviously necessary, for words of acceptance which do not correspond to the proposal actually made are not really an acceptance of anything, and, therefore, can amount to nothing more than a new proposal, or, as it is frequently called, a counter offer. The difficulties which occur under this head are difficulties not of principle but of construction, the question being in every case whether a particular communication is to be understood as a real and absolute acceptance, or as introducing a condition or qualification which makes it only a stage in a course of negotiation capable of leading, but not necessarily leading, to a concluded contract. Sometimes additional words that seem at first sight to make the acceptance conditional are no more than

(k) *Hyde v Wrench* (1840) 3 Bea 334, not otherwise in India, *Nihal Chand v Amar Nath* (1926) 98 I C 272, 8 Lah L J 434, A I R 1926 Lah 615

(l) 'These sections [7, 8 and 9] must be read without reference to the English law on the subject' Ashworth J, *Gadlar Mal v Tata Industrial Bank*

(1927) 49 All 674, 677, 100 I C. 1023, A I R 1927 All 407, *qu* whether provoked by irrelevant citations (argument not reported), but the language is clearly too wide, the real meaning must be that English decisions cannot prevail against the clear words of the Act

the expression of what the law implies, as where in England an offer to sell land is accepted "subject to the title being approved by our solicitors" The reasonable meaning of this appears to be not to make a certain or uncertain solicitor's opinion (which might be arbitrary) final but only to claim the purchaser's common right of investigating the title with professional assistance and refusing to complete if the title proves bad (m) Again, the offer of a new contract may be annexed to an absolute acceptance so that there is a concluded contract whether the new offer is accepted or not (n) On the other hand reference to special conditions not known to the other party (o), as distinguished from terms already made part of the proposal (p), will prevent an acceptance from being final So will a reference to future unspecified terms "to be arranged," or the like, between the parties or their agents (q) But an acceptance on condition, coupled with an admission that the condition has been satisfied, may be in effect unconditional (r)

Although there can be no contract without a complete acceptance of the proposal it is not universally true that complete acceptance of the proposal makes a binding contract, for one may agree to all the terms of a proposal, and yet decline to be bound until a formal agreement is signed (s) or some other act is done This is really a case of acceptance with an added condition but of such special importance as to call for separate mention There may be an express reservation in such words as these 'This agreement is made subject to the preparation and execution of a formal contract' (t) Or a proposal for insur

(11) *Hissay v Horne Payne* (1879) 4 App Cas 311, 322 per Lord Cairns (followed *Treacher & Co v Malone Hall*) (1911) 35 Bom 110 The decision of the C A who had taken a different view on this point was affirmed on other grounds

(n) *Sir Mahomed Jusuf v Secretary of State* (1920) 22 Bom L R 872, 45 Bom 8, 57 I C 971 The term counter offer is clearly not the right one to use in this view of the facts

(o) *Jones v Daniel* [1894] 2 Ch 312

(1) *Felly v Hensell* [1896] 2 Ch 737

(q) *Honeyman v Marryall* (1853) 6 H L C 112 *Starley v Bonedewell*

(1874) L R 10 C P 102, *Ickett v Norman Wright* [1925] 1 Ch 56

(r) *Roberts v Security Co* [1897] 1 Q B 111, C A The principle is sound but its application in the particular case doubtful, see *The Firestone Fire and Accident Office v The Chung Wo Hong* [1907] A C 96 101

(s) 'If to a proposal or offer an assent be given subject to a provision as to a contract then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation' *Chinnock v Marchioness of Fitz* (1835) 4 D R 638 646

(t) *Hein v Ball* (1877) 7 Ch D 21

ance may be accepted in all its terms, but with the statement that there shall be no assurance till the first premium is paid. Here again there is no contract but only a counter offer, and the intending insurer may refuse a tender of the premium if there has meanwhile been any material change in the facts constituting the risk to be insured against (u). Where there is no precise clause of reservation, but the acceptance is not obviously unqualified, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form (t), or whether they should be subject to a new agreement the terms of which are not expressed in detail (w), and this must be determined by examination of the whole of a continuous correspondence or negotiation. It will not do to pick out this or that portion which, if it stood alone, might be sufficient evidence of a contract (x). But where it appears that a complete contract was formed by unqualified acceptance of an offer at a certain date, subsequent negotiations will have no effect unless they amount to a new agreement (y).

In British India it has been laid down, in accordance with English law as well as with the terms of the Act, that an acceptance with a variation is no acceptance, it is simply a counter proposal, which must be accepted by the original promisor before a contract is made (z). Thus where an offer was made for the purchase of certain goods which were to be ordered out from Europe, an acceptance "free Bombay Harbour and interest," being a term not contained in the offer, was held to be no acceptance within the meaning of this section. Where a buyer signed a bought note after inserting therein in Chinese certain terms which were not in the sold note previously signed by the seller,

Finch Sel Ca 81, followed in *Hatfeldt Widenburg v Alexander* [1912] 1 Ch 284; *Rosville v Denny* [1921] 1 Ch 57, C A, *cp* the cases cited in note (g) last page.

(u) *Canning v Farquhar* (1886) 16 Q B Div 727, see especially per Lindley L J at p 733.

(t) *Harichand Mancharam v Gorin Luzman Gokhale* (1922) L R 50 I A 25, 47 Bom 330, 71 I C 763.

(w) *Jessel MR in Winn v Bill*, note (t) above.

(x) *Hussey v Horne Payne* (1879) 4

App Cas 311, *Aryodaya S & W Co v Javaljrasa* (1903) 5 Bom L R 909.

(y) *Perry v Suffell's Ltd* [1916] 2 Ch 187 C A.

(z) *Per Cur, Haji Mahomed v Spinner* (1900) 21 Bom 510, 523. Here the plaintiffs maintained that the additional term was already implied in the offer by a previous course of dealing or otherwise. The defendant maintained that there was a contract without that term. The Court held that there was no contract at all.

it was held that there was no contract unless the seller accepted the additional terms in Chinese (a) In such a case the acceptance with a qualification is in its nature a counter proposal which, if accepted by the proposer, would constitute an agreement (b) The English authorities have also been followed on the point that parties are free to provide that the agreement shall not be complete and operative until its terms are reduced into writing or are embodied in a formal document and that it is a question of interpretation whether they have done so or not Where however, there is no such stipulation express or implied, the mere circumstance that the parties intend to put the agreement into writing or in a formal instrument will not prevent the agreement from being enforced assuming of course that an agreement otherwise complete and enforceable is proved (c) The circumstance that the parties do intend a subsequent agreement to be made is evidence to show that they did not intend the previous negotiations to amount to an agreement though not conclusive, they will be bound by a previous agreement "if it is clear that such an agreement has been made" (d) Where however, the formalities are not of the parties' selection, so that nothing turns upon the intention of the parties no inference against a concluded agreement can be drawn from the non completion of these formalities Thus while a suit was pending the parties entered into a written agreement whereby the plaintiff agreed to accept the property of the defendant in adjustment of the suit The agreement was not recorded as required under s 98 of the Code of Civil Procedure then in force being Act VIII of 1859 [now Code of Civil Procedure 1908, O 21, r 2] It was not, therefore such a final adjustment of the suit as precluded the case from being proceeded with The plaintiff, taking advantage of that fact proceeded with the suit, and obtained a decree against the defendant The defendant subsequently brought a suit against the plaintiff for damages for breach of the agreement, and it was held that he was entitled to damages there having been a binding agreement between

(a) *1st Shan Sh Lee v Moolhia Chett* (1860) 4 C W N 453

(b) *Bhagwan / it v Shit D il* (1913) Lunj Rec 10 D 2 where the counter proposal was accepted

(c) *Wajmper v Palle* (1877) 3 All 41 citing *Brayton v Metropolitan Ins Co*

*Co* (1887) 2 App C 666 *Lees v Brass* (1877) 1 R 3 Q B D 66

*Bonnewell v Jenkins* (1878) 1 R 8 Ch D 70 and see note (v) above

(d) *Padjony v Wharton* (1867) 1 H I C 238 261

the parties, though the formality of recording the agreement was not completed (c) Such cases, however, must be distinguished from those where the negotiations have not led to a concluded agreement. Thus in *Koylash Chunder v Tarney Churn* (f) the defendant wrote to the plaintiff 'The value of your house has been fixed through the broker at Rs 13,125. Agreeing to that value I write this letter. Please come over to the office of my attorney between three and four this day with the title deeds of the house and receive the earnest.' In reply the plaintiff wrote 'You having agreed to purchase our house for Rs 13,125, have sent a letter through the broker, and we are agreeable to it, and we will be present between three and four this day at your attorney's and receive the earnest.' The plaintiff and the defendant met at the attorney's office but the attorney was absent and accordingly no inspection of title deeds or payment of the earnest money took place. The plaintiff sued the defendant for specific performance but it was held that there was no binding contract, as two important matters—namely inspection of the deeds (g) and the amount and payment of the earnest money—were left to be arranged at the attorney's office. Garth C.J. said 'As regards the earnest money it must be observed that both parties treat that as an element in the bargain. Suppose the meeting had taken place and the parties had been unable to agree as to the amount of the earnest money, how could it possibly have been said that they had arrived at any binding agreement?' (h) A provision in an agreement

(c) *Tlota Venkatachellasaiah v Aris nasaur y* (1874) 8 M. H. C. 1. See Mulla's Code of Civil Procedure 9th ed. pp. 630 sqq.

(f) (1884) 10 Cal. 588.

(g) It looks as if there had been some misapprehension here. In English practice at any rate a contract for purchase of land is not suspended until the title has been shown; there is a complete contract as soon as all the terms—including special conditions if any as to title—have been agreed upon subject to the purchaser's right to rescind or to compensation if a title is not shown according to the contract and often by agreement to the vendor's right to

rescind if he cannot remove any objection.

(h) It looks very much as if some well known customary proportion of earnest money was really intended by the parties but apparently there was no proof of this. In *Streegopal v Richey* (1882) 8 Cal. 806 a document purporting to be an agreement relating to the sale of a house was made subject to the approval of the purchaser's solicitor and it was held citing *Hudson v Buck* 7 Ch. D. 683 and *Hussey v Horne Paine* (in C.A.) 8 Ch. D. 670 that there was no complete contract between the parties until the title was approved by the purchaser's solicitor who was for that purpose constituted the sole and

for the sale of a house that "on approval of the title by the purchaser's solicitor the purchase money should be paid" has not the effect of rendering the completeness of the agreement conditional upon the approval of the title by the solicitor, but of simply fixing the time for the payment of the purchase money without waiting for a conveyance (2)

**Apparent without real Acceptance.**—In exceptional circumstances there may be an unconditional acceptance in terms of a proposal which in fact the parties do not understand in the same sense, and which neither party is estopped from understanding in his own sense. Here the acceptance is merely apparent, and no contract is formed. Such cases are better postponed till we come to s. 13, which see.

**Manner of Acceptance** [sub-s. 2].—A proposal must be accepted according to its terms. Therefore, if the proposer chooses to require that goods shall be delivered at a particular place, he is not bound to accept delivery tendered at any other place (3). It is not for the acceptor to say that some other mode of acceptance which is not according to the terms of the proposal will do as well.

The present sub section, however, throws on the proposer the burden of notifying to the acceptor that an acceptance not in the prescribed manner and form is insufficient, and he remains bound if he fails to insist on an acceptance such as he required. No previous or subsequent authority for this has been found in the Common Law nor does analogy seem to favour it.

At all events, one party to a negotiation cannot impose on the

absolute judge as to whether or not there was a good title, provided he acted reasonably and *bona fide*. This case seems, however, of doubtful authority, as Wilson J. did not feel free to follow the opinion expressed by Lord Curzon in *Hussey v. Horne Payne* in the House of Lords (see p. 50 above), which would presumably be upheld by the Judicial Committee. It would be a misfortune to Indian jurisprudence if English decisions made with regard to the very peculiar English conditions of land title and transfer were to be followed literally and indiscriminately by the Indian Courts.

(1) *Cohen v. Sutherland* (1890) 17 Cal. 919.

(2) *Flason v. Henshaw* (1819) Sup. Ct. U.S., 4 Wheaton 22. A communication by post of any demand or offer generally authorises the post as a proper mode of conveying the answer but a general authority to pay a sum due by remittance through the post will not authorise the unusual practice of enclosing considerable sums of coin or negotiable notes in a post letter. *Mitchell Henry v. Norwich Union Insurance Society* [1918] 2 K. B. 67, C. 1.

other the burden of expressly refusing either an original offer or a counter offer by saying that he will assume acceptance unless he hears to the contrary (k). Assent to his terms is a positive act within the other party's discretion, and he has no right to presume it. Neglect to answer a business offer is certainly not, as a rule, prudent or laudable, still there is no legal duty to answer at all.

8.—Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Acceptance by performing conditions or receiving consideration

**General Offers**—The terms of this section are very wide. Nothing like them occurs in the original draft of the Indian Law Commissioners, nor, so far as known to us, in any authoritative statement of English law. They appear to have been taken from the draft Civil Code of New York, with slight verbal alteration. In the absence of illustrations, their intended scope is not very clear. It seems however, fairly certain that the division of the subject matter of the section into two branches, 'performance of the conditions of a proposal' and "acceptance of any consideration for a reciprocal promise which may be offered with a proposal" corresponds to the general division of proposals into those which offer a promise in exchange for an act or acts and those which offer a promise in exchange for a promise. We have already noted on s 2 (a) and (b) (p 14 above) that the word *proposal* as defined by the Act seems to be limited to the offer of a promise. Accordingly 'performance of the conditions of a proposal' seems to be nothing else than doing the act requested by the proposer as the consideration for the promise offered by him, as when a tradesman sends goods on receiving an order from a customer. The only previous definition of acceptance in the Act is that a proposal is said to be accepted when the person to whom it is made 'signifies his assent thereto' (s 2 (b)). This has to be read with the provisions as to communication in ss 4 and 7. So far there might have been doubt whether acceptance can ever be binding without communication, and, indeed, the present section

(k) *Felthouse v Bindley* (1862) 11 B & C 51 Cp *Hays Mah v Evans & Skinner* C B N S 803, 132 R 1 784, Fincel (1900) 24 Bom 511 521

does not expressly dispense with communication in any case. Nevertheless it appears, in its first branch, to recognise the fact that in the cases in which the offeror invites acceptance by the doing of an act "it is sometimes impossible for the offeree to express his acceptance otherwise than by performance of his part of the contract" (l). The most obvious example is where a reward is publicly offered to any person, or to the first person, who will recover a lost object, procure certain evidence, or the like. Here the party claiming the reward has not to prove anything more than that he performed the conditions on which the reward was offered, which conditions may or may not include communication by him to the proposer. In the simple case of a reward proposed for something in which the proposer has an obvious interest, there is not likely to be any other question than what the terms were, and whether they have been satisfied by the claimant. There is some authority for construing the terms liberally in favour of a finder (m). But analogous or seemingly analogous cases may be less simple. There may be questions whether the offer was sufficiently certain or whether it was intended, or could reasonably be taken, as the offer of a contract at all. In England an open letter of credit authorising the addressee to draw on the issuer to a specified extent, and requesting "parties negotiating bills under it to endorse particulars" has been held to amount to a general invitation or request to advance money on the faith of such bills being accepted, and to constitute a contract with any one so advancing money while the credit remained open (n). This is undoubted law, but the same cannot be said of the judgments which have held (in the circumstances, not quite decisively) that when a sale by auction is advertised as without reserve the auctioneer makes a general offer to bidders which becomes a binding promise to the highest *bona fide* bidder, and gives him a right of action "as upon a contract that the sale shall be without reserve" (o), and that a railway

(l) Anson *Law of Contract* p. 20  
17th ed.

(m) Offer of reward to any one tracing a lost boy and bringing him home held to be earned by finding and prompt notification. *Har Bhayan Lal v Har Charan Lal* (1905) 23 All L J 655 88 I C 908 A I R 1925 All 539

(n) *The Agra and Masterman's Bank Ltd v The Banking Corporation*

(1867) L J 2 Ch 301 14 M 1 1 L 1 40

(o) *Warlow v Harrison* (1859) 1 F & F 301, 14 Cl. Two members of the Court refused to say that the auctioneer was liable as on a warranty that he had authority to sell without reserve. Probably courts of first instance in England are bound to follow this case. See *Johnson v Byles* (1899) 2 Ch 73 77

company's timetable is a general proposal to run trams according to the table, which is accepted by an intending passenger tendering the price of a ticket (*p*). These last mentioned cases at any rate, mark the extreme limit of effective proposals of a contract as distinguished from the invitation of proposals by a general statement of the terms on which one is minded to do business. It has been held, on the other hand, that when particular goods are advertised for sale by auction the auctioneer does not contract with any one who attends the sale intending to purchase those goods that they shall be actually put up for sale (*q*), and that an advertisement for tenders for goods to be sold is not a proposal capable of being a contract to sell to the highest bidder, but 'a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt' (*r*). In some cases the difficulty of ascertaining the acceptor if the announcement is treated as a proposal is enough to dispose of the question. A second hand book seller's catalogue is not a series of offers but only invitation of offers for if the catalogue had the effect of proposing a sale of every book to the first person who paid or undertook to pay the marked price the bookseller would be bound to decide at his peril, as between practically simultaneous applicants whose acceptance was first in order of time and this might involve obscure matters of both fact and law. Clearly the bookseller does not mean to tie his hands in this way nor can any reasonable customer suppose that he does. In fact interpretation must be largely guided in this class of transactions by business usage and common sense. Where the acceptance of a proposal consists of the performance of the condition of the proposal the contract is made at the place where the condition is performed (*s*).

**Acting on offer—when sufficient Acceptance**—The nature of the acceptance required in these cases was considered by the English Court of Appeal in *Carlill v Carbolic Smoke Ball Co* (*t*). The defendant company, being the proprietor of the carbolic smoke ball a device for treating the nostrils and air passages with a kind of carbolic acid

(*p*) *Denton v G A R Co* (1856) 5 E & B 860. It was also held that an action for deceit would lie on the facts. This opinion is not easy to reconcile with later authorities. See Pollock on Torts 13th ed 305.

(*q*) *Harris v Nickerson* 1873) L R 8

Q B 286

(*r*) *Spencer v Harding* (18 0) L R 5 C P 561

(*s*) *S taram Maricari v Thompson* (1905) 32 Cal 884

(*t*) [1893] 1 Q B 256

snuff, issued an advertisement offering £100 reward to any person who should contract influenza (or similar ailments as mentioned) after having used the ball as directed. It was also stated that £1,000 was deposited with a named bank, "showing our sincerity in the matter." The plaintiff bought one of the smoke balls by retail, did use it as directed, and caught influenza while she was still using it. Hawkins J (u) held in a considered judgment that she was entitled to recover £100 as on a contract by the company. The Court of Appeal held that the defendant company could not be heard to say the offer was not meant seriously, that the terms, though rather vague, were capable of a certain meaning, and at least included the event, which had happened, of the plaintiff taking influenza while still using the remedy, and that, if the offer was unguarded and improvident, that was the defendant's own folly and no answer to the plaintiff's claim. There was an offer to any one who performed the condition (namely, of using the smoke ball as directed) on the faith of the advertisement, and by such performance it became a contract, not absolute, but subject to the further independent condition of the user contracting influenza or the like while using the remedy, and perhaps during some reasonable time afterwards. (As to conditional, or, as the Act calls them, contingent contracts in general, see Chap III, below, ss 31 sqq.) As to the objection that to complete the plaintiff's acceptance of the offer there must either be communication to the defendant or some act of a public nature, Bowen L J said (v) "One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. But there is this clear gloss to be made upon that doctrine, that, as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose that there can be no doubt that where a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance, and if the person making the offer expressly or impliedly intimates in his offer

(v) This fact is not disputed. See Q B 491.  
the report in the Court below [1891] - (v) [1893] 1 Q B at 120

that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification" *Cp* s 7 (2), p 49, above

It was said without hesitation, several years earlier, by a very learned American writer, that "in a unilateral contract"—i.e., where a performance is given for a promise—"an acceptance in terms may be, and commonly is, dispensed with" (w) Earlier still the question had been judicially thrown out "If a man writes, 'Send me such and such goods, and I will pay for them,' is not the sending of the goods, without more, an acceptance of the offer?" (x) Perhaps it would now be a safe and more elegant way of stating the law to say that a proposal is in every case accepted by performance of its conditions (or perhaps, more accurately, by compliance with its terms), that communication by the acceptor to the proposer or his authorised agent is necessary when the terms consist of or include a counter promise (for there is no promise at all without communication) (y), but that when only acts are required the communication of their performance may or may not be added as a term of the offer at the will of the proposer, which may be either express or inferred from the nature and circumstances of the proposal (z) From this point of view, the present section of the Act would be logically prior to s 7

Does an act done by a person in ignorance of the proposal amount to 'performance of the conditions of the proposal' within the meaning of this section? According to the High Court of Allahabad it does not. The plaintiff in that case was in the defendant's service as a *muntib*. The defendant's nephew absconded, and the plaintiff volunteered his services to search for the missing boy. In his absence the defendant issued hand bills offering a reward of Rs. 501 to any one who might find

(w) Langdell Summary of the Law of Contracts s 12, *cp* Harriman on Contract § 48. 2nd ed.

(x) Crosswell J. in *Harvey v. Johnston* (1818) 6 C. B. 245, 304, 77 R. R. 328, 332. The suggestion appears to have escaped the notice of text writers for many years.

(y) Even the English doctrine (unknown in India) that a covenant is deemed binding without communication to the covenantee is no real exception. The

maker of the deed is bound not because a promise not communicated can of itself be binding, but because he has solemnly acknowledged himself to be bound.

(z) Definite proposals (e.g., to guarantee a particular ascertained or ascertainable debt) must be distinguished from expressions of undefined willingness which only invite a proposal, see *Lopez Fin. Thaler Diss. v. Lajpuri Sahib* (1928) 113 I. C. 780, A. I. L. 1928 Lah. 928 and commentators § 3 above.

out the boy. The plaintiff traced him and claimed the reward. The plaintiff did not know of the hand bills when he found out the boy. Held that the plaintiff was not entitled to the reward (a). The Court declined to follow the English case of *Williams v Carwardine* (b) as an authority that if A offers a promise for an act and B does the act in ignorance of the offer, B is nevertheless entitled to claim performance of the promise from A. There has been another somewhat peculiar case before the Judicial Committee (c). The plaintiff was a grandniece of Papamma, a wealthy Hindu widow, and was brought up by her from early age. At the age of fourteen the plaintiff was married to an ex zamindar who owned property of considerable value. Papamma was anxious that the plaintiff, although married, should continue to live with her, and she promised that if the plaintiff and her husband would reside with her, she would make provision for her on a fairly ample scale by the purchase of immovable property for her. The plaintiff and her husband accordingly lived with Papamma. In 1893 Papamma bought a village in her own name, but, as she stated, for the appellant. Dissatisfaction arose because it was not transferred to the plaintiff and the husband consequently ceased to reside with Papamma. Papamma sent messages to the husband asking him to return but he did not return. In October, 1893 Papamma wrote a letter in her own hand to the plaintiff herself stating that the village had been purchased for the appellant and would be transferred to her upon the writer's death. The plaintiff and her husband thereafter resided with Papamma until Papamma's death in 1899. After Papamma's death the plaintiff instituted a suit for a declaration that she was entitled to the village and for possession thereof. Their Lordships held that the letter of October, 1893, constituted a promise which was accepted by the plaintiff, and that there was a completed contract which entitled the plaintiff to possession of the village. 'The Board is of the opinion accordingly that there has been a completed contract. Papamma accomplished her desire, and she obtained the consideration which she had so much at heart. Acceptance of her terms and compliance with her stipulation were made. The words [sic] of Lord St Leonards in

(a) *Lalman Shukla v Chauri Dutt* (1913) 11 All J J 459

(b) (1833) 1 B & A 621 38 P J 728. It is doubtful whether the Court intended so to decide at any rate the

decision is not received in that sense in England.

(c) *Malraju Lal Ais Venkayamma v Venka A Varun Na Appal* 10 (1916) 1 R 431 A 138 33 Mal 1091, 34 IC 921

*Maunsell v. Hedges* (d) might be asked here: "Was it not a proposal, with a condition, which being accepted, was equivalent to a contract?" Their Lordships do not doubt that it was" (e)

**Acceptance by receiving consideration.**—The second branch of the section as to "acceptance of any consideration," etc., is rather obscure. It is hard to say with any certainty what particular class or classes of transactions it covers, and the words seem more appropriate to gifts or transfers of property than to contracts. It is generally sound principle, no doubt, that what is offered on conditions must be taken as it is offered. The use of the word "reciprocal" is curious, for it hardly fits the most obvious class of cases, as where goods are sent on approval, and the receiver keeps them with the intention of buying them. Here the seller need not and commonly does not offer any promise, and there is therefore no question of a reciprocal promise as defined in the Act (s. 2 (f)). No doubt the acceptance of an offered consideration, *as such*, amounts to giving the promise (whether reciprocal or not) for which it was offered, or else raises an equivalent obligation. But a thing which is offered in one right and for one purpose may be taken under a different claim of right and with a different intent, and in that case (which is exceptional but of some importance) the legal result will not be a contract between the parties, whatever else it is capable of being, unless indeed the party receiving the thing so conducts himself as to lead the proposer reasonably to conclude that there is an acceptance according to the offer, and then the proposer can hold him liable on the universal principle that a man's reasonably apparent intent is taken in law to be his real intent. We cannot suppose that the present section is intended to preclude all inquiries of this kind by making every receipt in fact of a thing offered by way of consideration a conclusive acceptance of the proposal. It has been applied however to the case of a bank's customer receiving notice, which he did not answer, of an increase in the rate of interest on overdrafts, and afterwards obtaining a further advance, held that he accepted a consideration offered by the bank within the terms of this section (f).

(d) (1854) 4 H. L. C. 1039

(e) L. R. 43 L. A., at p. 146; 39 Mad., at p. 522.

(f) *Gaddar Mal v. Tata Industrial Bank* (1927) 49 All. 674; 100 L. C. 1023; A. I. R. 1927 All. 407.

## CHAPTER II.

## OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

10.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void

What agreements are contracts

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents

The first paragraph of this section is developed and applied by the more specific provisions of several following sections, which will be considered as they occur

As to contracts required to be in writing —See s 25, sub ss 1 and 3, and s 28, Exception 2, pp 190 and 221 below See also Indian Companies Act VII of 1913, s 9, as to memorandum of association s 19 as to articles of association, and s 88 as to contracts by companies In this connection may also be noted the provisions of the Transfer of Property Act which require a writing in the case of a sale (s 54), of a mortgage (s 59), lease (s 107) and gift (s 123), and the provisions of the Indian Trusts Act which require a trust to be created in writing (s 5), but these are not cases of contract in the proper sense of the word Acknowledgments to save the law of limitation are required to be in writing by s 19 of the Limitation Act XV of 1908 Submissions under the Arbitration Act IX of 1899 are similarly required to be in writing

Oral and documentary evidence —The Act does not deal with the kind of proof generally required to establish the facts constituting a contract In British India the law on that subject is codified in the Evidence Act I of 1872 See especially ch VI of that Act, ss 91 sqq as to the exclusion of oral by documentary evidence

**Variance between print and writing**—Print and other mechanical equivalents of handwriting are generally in the same position with regard to rules of evidence and construction. But where a contract is partly printed in a common form and partly written, the words added in writing are entitled, as Lord Ellenborough said in a judgment repeatedly approved (1), if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and words selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions. But the print is not to be discarded altogether, and the Court should discover the real contract of the parties from the printed as well as from the written words (1)

**As to the law relating to Registration**—S 17 of the Indian Registration Act XVI of 1908 specifies documents which require to be registered, and s 49 of the same Act provides that no document required by s 17 to be registered shall affect any immovable property, unless it has been registered in accordance with the provisions of that Act

**11**—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject

This section deals with personal capacity in three distinct branches (a) disqualification by infancy, (b) disqualification by insanity, (c) other special disqualifications by personal law

**“To Contract”**—That is, to bind himself by promise. A minor who gives value, without promising any farther performance, to a person competent to contract is entitled to sue him for the promised

(1) *Robertson v French* (1803) 4 East 130, 7 R R 538 540 approved in *H L Glynn v Margetson* [1893] A C 351 357 in C A *Standard Marine Insurance Co* (1889) 22 Q B Div 499 501

*Noorbhai v Allabux* (1917) 19 Bom L R 845 42 I C 820

(1) *Paul Beier v Chotalal Javerdas* (1906) 30 Bom 1

equivalent (m) This may be properly not in contract but on a quasi-contract under s 70 (p 393, below)

**Infancy.**—As to infancy, the terms of the Act (n), as compared with the Common Law, were long a source of grave difficulty By the Common Law an infant's contract is generally not void but voidable at his option, if it appears to the Court to be for his benefit, it may be binding, and especially if the contract is for necessities There was formerly, however, a current opinion, countenanced by the law forms in which some of the decisions were expressed, that infants' agreements were of three kinds namely, that some were wholly void as being obviously not for the infant's benefit, some valid as being obviously for his benefit, and all others voidable This opinion is now quite exploded (o), but it was to be found in text books at the time when the Indian Contract Act was framed Still, there was never any authority for saying that infants were absolutely incompetent to contract The literal construction of the present section requires being of the age of majority according to one's personal law as a necessary element of contractual capacity Since, however, the Act, as a whole, purports to consolidate the English law of contracts, with only such alteration as local circumstances require, and there is no trace in the report prefixed to the original draft, or any other relative document, of any intention to make a new rule as to the contracts of minors, the Indian High Courts endeavoured to avoid a construction involving so wide a departure from the law to which they had been accustomed, but the Judicial Committee in 1903 declared that the literal construction is correct, and suggested that it was intended to give effect to the rule of Hindu law on the subject (p)

We may mention that in England the powers of infants to contract and to ratify their contracts have been much restrained by the Infants' Relief Act of 1874, a statute of good intentions and imperfect workmanship, and the Sale of Goods Act, 1893, s 2, has declared the

(m) *Bhola Ram &c v Bhagat Ram* (1926) 99 I C 318 8 Lah L J 539, A I R 1927 Lah 24

(n) They are almost identical with those of the original draft There is nothing to show that the Commissioners were aware of any difficulty *Quare* whether they intended to alter the law

(o) Anson Law of Contract 17th ed 126

(p) *Mahora Bhee v Dhurmodis (hose)* 30 Cal 539, I I 30 I \ 114 followed *Mir Sarwarjan v Fakhruddin Valomed* (1912) 39 Cal 232 13 I C 331 *Ma Hui v Hashim* (1900) 22 Bom I R 531 " I C "03

liability of infants to pay a reasonable price (q) for necessities sold and delivered to them, and has defined necessities according to the latest and best judicial authorities. These enactments, of course, have no authority in India, and can be referred to only for the purpose of illustrating the common law rules. The result of the statutes is to bring the English law much nearer to the Anglo Indian, for most practical purposes, than it might seem at first sight. We proceed to the details of the Anglo Indian law.

**Age of majority.**—This is now regulated by the Indian Majority Act IX of 1875. Sec 3 of the Act declares that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before. In the case, however, of a minor of whose person or property or both a guardian has been appointed by a Court, or of whose property the superintendence is assumed by a Court of Wards, before the minor has attained the age of eighteen years, the Act provides that the age of majority shall be deemed to have been attained on the minor completing his age of twenty-one years. Sec 2 of the Act declares that nothing in the Act contained shall affect the capacity of any person to act in matters of marriage, dower, divorce, and adoption. An order discharging the guardian of a minor under s 48 of the Guardians and Wards Act, 1890, does not terminate the minority when it is obtained by fraud practised upon the Court by a third party (r).

“Law to which he is subject”—The age of majority as well as the disqualification from contracting is to be determined by the law to which the contracting party is subject. This provision is applied according to the principle of English law namely, that the question of the capacity of a person to enter into a contract is decided by the law of his domicile, and not the law governing the substance of the contract. Thus in *Kashiba v Shripat* (s) a Hindu widow above the age of sixteen and under the age of eighteen years, whose husband had his domicile in British India, executed a bond in Kolhapur (outside British India), where she was then residing. As the widow had not changed her domicile after her husband's death her domicile was the

(q) It need not be the price contracted for. We shall recur to the significance of this point.

(r) *Subramaniam v Doraidinga* (1913)

24 Mad L J 49 16 I C 943

(s) (1891) 19 Bom 697. See also *Rolikhani and Kumau Bank Ltd v*

*Row* (1885) 7 All 490

same as that of her husband at his death, namely, British India. The question arose whether her liability on the bond was to be governed by the law of Kolhapur (*lex loci contractus*), or by the law of British India (law of her domicile). According to the law obtaining in Kolhapur, which is Hindu law unaffected by the Contract Act, she would have been liable on the bond, as the age of majority according to that law is sixteen years (t), and the bond was executed by her after she completed her sixteenth year. According to the law in British India, namely, the Contract Act, she was not liable, as the contract was made when she was under the age of eighteen years, and was not ratified by her after she attained her majority. It was held that her capacity to contract was regulated by the Contract Act, being the law of her domicile, and that under the Act she was not liable on the bond.

**Minor's agreement**—If the first branch of the rule laid down in the section be converted into a negative proposition, it reads thus: No person is competent to contract who is *not* of the age of majority according to the law to which he is subject, in other words, a minor is *not competent* to contract. This proposition is capable of two constructions: either that a minor is absolutely incompetent to contract, in which case his agreement is void, or that he is incompetent to contract only in the sense that he is not liable on the contract though the other party is, in which case there is a voidable contract. If the agreement is void, the minor can neither sue nor be sued upon it, and the contract is not capable of ratification in any manner (u), if it is voidable, he can sue upon it, though he cannot be sued by the other party, and the contract be ratified by the minor on his attaining majority. The former current of Indian decisions was that, as under the English law, a minor's contract is only voidable at his option (v). But in 1903, as mentioned above (w), the Judicial Committee ruled that "the Act makes it essential that all contracting parties should be competent to contract," and especially provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. It was accordingly held that a mortgage

(t) See Mayne's Hindu Law s 210, 6th ed (1900)

(u) *Surya Narain v Sullu Akir* (1928) 51 All 161, 112 I C 159 A I R 1928 All 410, cp *Indeshri (or Bindeshari) Balaiah Singh v Chandika Prasad* (1909)

49 All 137, 100 I C 748 A I R 1927 All 212. See notes on s 25 pp 191 seq below

(v) At this distance of time it seems useless to cite these judgments

(w) P 18

made by a minor is void, and a money lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money under ss 64 and 65 on a decree being made declaring the mortgage invalid. This decision leaves no doubt that a mortgage by a minor being void, no decree can be passed on the mortgage either against the mortgagor personally or against the mortgaged property (x).

The case of an agreement for marriage made for a daughter under age by her guardian, such being the custom of the parties' community (in this case Goans) has been treated as exceptional, and damages awarded against the intended husband for breaking it (y). A Mahometan widow cannot make a partnership contract for her minor children (z).

**Fraudulent Representation.**—In *Mohori Bibee's* case cited above, it was contended on behalf of the money lender that an order should be made for a return of the money advanced by him under s 41 of the Specific Relief Act I of 1877. As to this part of the case the Judicial Committee said: "Another enactment relied upon as a reason why the mortgage money should be returned is s 41 of the Specific Relief Act (I of 1877), which is as follows:—'Sec 11. On adjudging the cancellation of an instrument the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.' Sec 38 provides in similar terms for a case of rescission of a contract. These sections, no doubt, do give a discretion to the Court, but the Court of first instance, and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised" (a).

The decision has been regarded by the Indian Courts as an authority that the circumstances of a particular case may be such that,

(x) *Saral Chand Mitter v Mohun Bibi* (1898) 25 Cal 371, in which a mortgage decree was passed, is no longer good law. See judgment of Jenkins J on p 385 of the report.

(y) *Pose Fernandes v Joseph Gonsalves* (1924) 49 Bom 673, 85 I C 587, A I R 1925 Bom 97. The cases on guardian's

dealings with property (pp 76, 77 below) were also relied on.

(z) *A Khorasany v C Acha* (1928) 6 Ran 193, 110 I C 349, A I R 1928 Rang 160.

(a) (1903) L R 30 I A at p 120, 30 Cal at p 549.

having regard to s 41 of the Specific Relief Act, the Court may, on adjudging the cancellation of an instrument at the instance of a minor, require the minor to make compensation to the other party to the instrument (b) It has accordingly been held that where a mortgage of his property by a minor is set aside by the Court, the Court may make compensation to the lender if the loan was obtained by the minor by fraudulently representing that he was of full age (c) It has similarly been held that where a sale of his property by a minor, which of course, is void under the Privy Council ruling is set aside by the Court, the Court may, if satisfied that the sale was procured by the minor by a fraudulent misrepresentation as to his age, direct the minor to make compensation to the purchaser (d)

It is well established in English law that an infant cannot be made liable for what was in truth a breach of contract by framing the action *ex delicto* "You cannot convert a contract into a tort to enable you to sue an infant" (e) In *R Leslie, Ltd v Sheill* (f) the Court of Appeal held that where an infant obtains a loan by falsely representing his age, he cannot be made to pay the amount of the loan as damages for fraud, nor can he be compelled in equity to repay the money As to the extent to which the aid of equity can be invoked in cases of fraudulent misrepresentation as to age Lord Sumner said "I think the whole current of decisions down to 1913 apart from dicta which are inconclusive, went to show that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill gotten gains or to release the party deceived from obligations or acts in law induced by the fraud but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant, even by means of a fraud Restitution stopped where repayment began" (g) His Lordship then proceeded "The money was paid over in order to be used as the defendant's own, and he has so used it and spent it There is no question of tracing it,

(b) See *Dattaram v Vinayal* (1903) 28 Bom 181 at p 190

(c) *Kamla Prasad v Shro Gopal Lal* (1904) 26 All 340, *Jadar Singh v Narindar Singh* (1904) Punj I cc No 37, *Vaikuntaram v Auth moolim* (1915) 25 Mad 10-1

(d) *Jayar Nath Singh v Lalji* (1908) 31 All 21, *Shyam Lal v*

*Lara* (1909) 30 All 25, *Balaji Iyer v Dattu* (1910) Punj I cc No 76, *Muhammaad v I v P Shree Narayan* (1913) 40 All 614 87 I C 79 All I 19 (All 108

(e) *Stannings v I - (1911) 8 T 11 230, 4 R R 6-1*

(f) [1914] 3 R 1

(g) *Ibid.* at p

no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources—in a word, nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so" (i). In *R. Leslie, Ltd v. Sheill* the loan was not secured by a mortgage. The principle of that decision was applied by the Judicial Committee to a case from the Straits Settlements where the loan was secured by a mortgage of the minor's property (i). The Lahore High Court, however, has held that the power to give equitable relief is more extensive in India than in England and ordered a money compensation (j).

**Burden of Proof.**—A party sued on an instrument who denies liability on the ground that at the date of his execution he was a minor must, of course, prove his allegation (jj).

**Estoppel.**—If a minor procures a loan or enters into any other agreement by representing that he is of full age, is he estopped by s. 115 of the Indian Evidence Act I of 1872 (k) from setting up that he was a minor when he executed the mortgage? The point was raised, but not decided, in *Mohori Bibee's* case (l). In that case the Judicial

(h) *Ibid.*, at p. 619.

(i) *Malomed Syedol Ariffin v. Iesh Ooi Garh* (1910) 43 I A 256 pp. 263-64, [1916] 2 A C 575. 39 I C 401. 21 C W N 257, these authorities appear to rule out a dictum in *Radha Kishan v. Bhore Lal* (1928) 50 All 862, 110 I C 373, A I R 1928 All 626. The decision is on the point of estoppel (note (k)), but of no value, as authorities, for some reason not apparent were not even cited. See *Radha Shyam v. Behari Lal* (1918) 40 All 558 559-560.

(j) *Khan Gul v. Lalha Singh* (1928) 9 Lah 701, 111 I C 175, A I R 1928 Lah 609. The decision clearly goes beyond the English doctrine of following property which was the ground of *Stocks v. Wilson* [1913] 2 K B 235.

(jj) *Narain Singh v. Chiranj Lal* 46 All 598, 79 I C 915. A I R 1924 All 730, followed *Surja v. Suts Prasad* (1925) 47 All 493. 87 I C 415.

(k) When one person has by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

(l) (1903) 30 I A 114, 122, 30 Cal 539, 545, referred to by Sumner L J in his judgment in *R. Leslie, Ltd v. Sheill* [1914] 3 K B 607, at p. 615, *Lal Dhar v. Piarey Lal* (1921) 19 All L J 578, 62 I C 258.

Committee said: "The Courts below seem to have decided that this section does not apply to infants; but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties, and their Lordships hold, in accordance with English authorities, that a false representation, made to a person who knows it to be false, is not such a fraud as to take away the privilege of infancy." There is a conflict of judicial opinion in India. The High Court of Bombay has held that the section applies to minors, and that a sale of his property by a minor who had represented that he was of full age is binding on him (m); also where a minor shareholder in a company continued to receive dividends on his shares after attaining majority, that he was estopped by his conduct from denying as between himself and the liquidator of the company that he was a shareholder (n). But it has more lately held otherwise (o). The course of decisions in Calcutta seems to be the other way. In *Mohori Bibee's* case, the view taken both by the Court of first instance and the Appellate Court seems to be that the section does not apply to minors (p). The same view was taken in a recent case (q) where the Court said: "It is unnecessary to consider whether a minor can be estopped in any case, but we think that the law of estoppel must be read subject to other laws, such as the Indian Contract Act, and that a minor cannot be made liable upon a contract by means of an estoppel under s. 115 of the Indian Evidence Act, when some other law (the Contract Act) expressly provides that he cannot be made liable in respect of the contract. . . . In *Surendra Nath Roy v. Krishna Sakhi Dasi* (r), it was held that if there was mis-

(m) *Ganesh Lala v. Bapu* (1895) 21 Bom. 129; *Dadasaheb v. Bai Nahani* (1917) 41 Bom. 480; *Jasraj Bustimal v. Sadashiv Mahadev* (1922) 46 Bom. 137; 61 I. C. 451; A. I. R. 1923 Bom. 169. In all these cases the misrepresentation was fraudulent.

(n) *Fazulbhoy v. Credit Bank* (1914) 39 Bom. 331. In this case there was no fraud.

(o) *Madgadhkar J., Balangucha Bhiman-*

*gouda v. Gadigeppa Bhimappa* (1928) 31 Bom. L. R. 310; 118 I. C. 698; A. I. R. 1923 Bom. 201.

(p) *Dharmo Das Ghose v. Brahma Dutt* (1898) 25 Cal. 616, 622; affd. on app. nom. *Brahma Dutt v. Dharmo Das Ghose* (1898) 26 Cal. 381, 388, 391.

(q) *Gulam Abbas v. Hem Chandra* (1916) 29 C. W. N. 418; 32 I. C. 388.

(r) (1910) 15 C. W. N. 239.

representation by a minor operating to deceive, and if the vendor were deceived by it, the minor would be bound by the transaction. In this case, as we have already stated, the Court found that there was no fraudulent representation on the part of the minor." The High Court of Allahabad has held that a minor who procures a loan by falsely representing that he is of full age is not estopped from pleading his minority in a suit upon a promissory note passed by him (r). In a Madras case (t) Sadasiva Ayyar J. took the same view as the Allahabad High Court. Wallis J. said that "*in the absence of fraud* an infant is not estopped from pleading minority." It is difficult to understand how, if s. 115 applies to the case of minors, any distinction can be drawn between innocent and fraudulent misrepresentation. Sec. 115 of the Evidence Act is no more than a rule of evidence, and it is, indeed, curious that what is merely a rule of evidence should be so construed as to nullify the express provisions of substantive law contained in s. 11 of the Contract Act. We are inclined to think that s. 115 does not apply to minors, and we put it on the broad ground that in a body of codified law no one enactment should be so construed as to render the express provisions of another enactment absolutely nugatory (u). In England the Infants' Relief Act, 1874, would be a complete answer to the plea of estoppel as regards agreements declared to be void by that Act (t). No doubt, the rule of estoppel in England forms part of the unwritten law, but that should not make any difference on principle.

**Mortgages and sales in favour of minors.**—Sec. 7 of the Transfer of Property Act, 1882, provides that every person competent to contract and entitled to transferable property is competent to transfer such property. But it is not provided anywhere in the Act that a person not competent to contract is incapable of being a transferee of property. It has accordingly been held that though a sale or mortgage of his property by a minor is void (w), a duly executed transfer by way of

(s) *Kanhai Lal v. Babu Ram* (1911) 8 All. L. J. 1058; *Kanhaya Lal v. Girdhari Lal* (1912) 9 All. L. J. 103, 13 I. C. 956. See also *Jagar Nath v. Lalla Prasad* (1908) 31 All. 21, 26, 34.

(t) *Vaikuntarama v. Authimoolam* (1915) 38 Mad. 1071; 23 I. C. 799.

(u) The Lahore High Court (overruling a former divisional decision) has

come to this conclusion on a full review of authorities. *Khan Gul v. Lakha Singh* (1928) 9 Lah. 701, 111 I. C. 175, A. I. R. 1928 Lah. 609.

(v) *R. Leslie, Ltd. v. Sheil* [1914] 3 K. B. 607, 615.

(w) *Mohori Bibee v. Dhurmodas Ghose* (1903) 30 I. A. 114, 123; 30 Cal. 539, 547.

sale (x) or mortgage (y) in favour of a minor who has paid the consideration money is not void, and it is enforceable by him or any other person on his behalf. A minor, therefore, in whose favour a deed of sale is executed is competent to sue for possession of the property conveyed thereby (z). The Patna High Court, however, has held that a lease to a minor is void, as it imposes upon him obligations to pay rent and perform covenants (a). Obviously he cannot be sued on any covenant, express or implied, but it does not seem clear why the interest which the lessor purports to convey should not pass. In the absence of a false representation of full age, it was the lessor's own folly to take a minor's covenant. Similarly where property is conveyed to a minor, and the latter is subsequently ousted on suit by third parties, he is entitled to recover from the vendor the sum which he had paid as purchase money (b). And it has been held by a Full Bench of the Madras High Court that a mortgage executed in favour of a minor who has advanced the mortgage money is enforceable by him or by any other person on his behalf (c). The High Court of Madras had held, on the analogy of the above cases, that a promissory note executed in favour of a minor is not void and can be sued upon by him (d).

**Ratification** —As it is now finally settled that a minor's agreement is void, it follows that there can be no question of ratifying it. Upon the same principle a promissory note given by a person on attaining majority in settlement of an earlier one signed by him while a minor in consideration of money then received from the obligee cannot be enforced in law. Such a note, the Madras High Court holds, is void.

(x) *Ulfat Bai v Gauri Shankar* (1911) 33 All 657, *Narsin Das v Musa nmah Dhania* (1916) 38 All 154, 35 I C 23. *Munni Koer v Madan Gopal* (1916) 38 All 62. 31 I C 792. *Munia v Perumal* (1911) 37 Mad 390. See also *Maghan Dula v Iran Singh* (1908) 30 All 63 [purchase by a joint Hindu family in the name of a minor member].

(y) *Paghava Charariar v Srinivasa* (1917) 40 Mad 308 (F B) overruling *Narakottu v Logalinga* (1909) 33 Mad 312, *Madhab Koeri v Baikuntha Karmakar* (1919) 41 at L J 682. *Zafar Hasan v Zubaida Akhatun* 121 I C 379; (1929) All I J

1114 A I R 1929 All 601

( ) 33 All 657 *supra* 33 All 62 *supra* 37 Mad 390 *supra* 38 All 161 *supra*

(a) *Pramala Das Das v Jogeshwar Mandal* (1918) 3 Pat L J 518 46 I C 670

(b) *Walidat Khan v Janak Singh* (1913) 35 All 370 10 I C 610

(c) *Paghava Charariar v Srinivasa* (1917) 40 Mad 308, *Hari Mohan v Mohini Mohan* (1917) 22 C W N 130 33 I C 991

(d) *Janjira u v Madhura* (1913) 21 Mad I J 363. *Madhab Koeri v Baikuntha Karmakar* (1919) 41 at I J 682

for want of consideration (e) In a Calcutta case (f) a bond was executed by S, after attaining majority, promising to pay within a year Rs 7,000 being the price of piece goods sold to him during his minority, and also to repay Rs 76 advanced to him for necessities. The obligee sued S on the bond, and it was held that S was liable. The Court said "Here the contract on which the suit is brought is by a defendant of full age, it is a new contract, by it the plaintiff has debarred himself from suing until the expiration of one year after the date of the contract for moneys which are alleged to be due at the date of the contract, and he had made an advance of Rs 76. There was thereupon a new consideration for the promise on which the defendant is sued, and in my opinion, in the absence of any statutory provision such as that to be found in England in s 2 of the Infants' Relief Act, 1874, he is liable." The only difference between this and the Madras case, so far as the note sued upon goes, is that in the latter case there was a promissory note passed during minority, and the note was renewed by the defendant on attaining majority, while in the Calcutta case there was no bond passed during minority, but the bond was executed for the first time after attaining majority. This circumstance, however, cannot make any difference in principle, nor is there anything in the judgment in the Calcutta case to show that the decision proceeded upon any such difference. The ground of the decision was that there was a new consideration for the promise on which the defendant was sued. We fail to see how either the forbearance to sue or the advance for necessities could be regarded as a new consideration and we are of opinion that the decree so far as it awarded to the plaintiff the price of the goods sold was erroneous in law (g). In England it is not clear that money advanced to a minor for the purchase of necessities and actually expended thereon may not be recovered as having been itself a necessary. See notes to s 25 cl (2).

(e) *Indrau Ramaswami v Anthappa Chettiar* (1906) 16 Mad L J 294  
*Arumugan v Duraisinga* (1914) 37 Mad 38 12 I C 568  
*Suraj Narain v Sukhu Ahir* cited p 68 above. See also *Chuah Hoo Guoh Neoh v Khaw Sim Bee* (1915) 19 C W N 786 (re opening settlement of property made during plaintiff's infancy).

(f) *Kundan Bhai v Sree Narayan*

(1906) 11 C W N 135 followed in *Karm Chand v Basant Kuar* (1911) Punj Rec no 31.

(g) The opinion here expressed was approved by the Lahore High Court *Bhola Ram Harbans Lal v Bhagat Ram* (1906) 99 I C 318 A I R 1927 Lah 24. But see *Narain Singh v Chitranji Lal* (1924) 46 All 568 79 I C 945 A I R 1924 All 730.

12. Act, 1876, he is not competent to alienate his property, and the same incapacity extends to contracts entered into by him, though they relate to property situate outside the province of Oudh (y)

The disability of alien enemies to sue in our Courts without licence is a matter of general public policy not coming under this head

12.—A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests (z)

What is a sound mind for the purposes of contract

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind (a)

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind

#### Illustrations

(a) A patient in a lunatic asylum who is at intervals of sound mind may contract during those intervals

(b) A sane man who is delirious from fever or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests cannot contract whilst such delirium or drunkenness lasts

**Burden of proof**—The difficulty of understanding what is really the effect of this section, in conjunction with s 11, has already been pointed out. The presence or absence of the capacity mentioned in this section at the time of making the contract is in all cases a question of fact. Where a person is usually of unsound mind, the burden of proving that at the time he was of sound mind lies on the person who affirms it. In cases, however, of drunkenness or delirium from fever or other causes, the onus lies on the party who sets up that disability to prove that it existed at the time of the contract. Questions of undue influence and of incapacity by reason of unsoundness of

(y) *Lachmi Narain v Fateh Bahadur Singh* (1902) 25 All 135 202

(z) As to evidence of unsound mind see *Jam Sundar Saha v Kali Narain Sen* (1927) 104 I C 527, A I R 1927

Cal 889

(a) See for an elementary illustration the facts in *Jas Narain v Mahabir Prasad* (1921) 2 Luck 208 O I C 87 A I R 1926 Oudh 470

not to be mixed up involving as they do totally different  
things (b)

**Contract in lucid interval**—The second paragraph of the section provides that a person who is usually of unsound mind but occasionally of sound mind may make a contract when he is of sound mind. Thus even a patient in a lunatic asylum may contract during lucid intervals (see illustration (a)). The question may arise whether a lunatic adjudged to be so under the Act IV of 1912, and of whose property a committee or manager is appointed, can contract during intervals of sound mind. In England a lunatic not so found, or before he is so found by inquisition is not by reason of that fact absolutely incapable of contracting though the burden of proof in such a case is on the party maintaining that he is not insane, or that the contract was made during a lucid interval (c), and the same would appear to be the law in India. Where, however, a committee or a manager of the estate of a lunatic adjudged to be so is appointed under either of the Indian Acts, no contract can be entered into by a lunatic in respect of his estate even though at the time of the contract he may be in a lucid interval. Similarly it is now settled in England that a person found lunatic by inquisition is incapable of dealing with his property *inter vivos* while the inquisition is in force (d).

**13.—Two or more persons are said to consent when**  
Consent  
defined
they agree upon the same thing in the same  
sense

**Apparent and real consent**—The language of this section is, on the face of it, more of a judicial or expository than of a legislative kind. As an authoritative definition it does not seem to define very much. It would need some courage to maintain that persons can be said to consent when they do not agree upon the same thing or that if they do not agree in the same sense they can be said to agree in any sense at all.

(b) *Sayad Muhammad v Fattah Muhammad* (1894) L R 22 I A pp 4 10 22 Cal 324, *Durga Bakhsh Singh v Mirza Muhammad Ali Beg* (1904) L R 31 I A 235

(c) *Hall v Warren* (1805) 9 Ves 605

7 R R 300 to which *Snook v Watts* (1848) 11 Beav 105, adds nothing material

(d) *Re Walker* (1905) 1 Ch 160, C A. Of a will it is otherwise for the reason explained *ib id* at p 172

If the section is to cover all kinds of contracts, as presumably it does, the word "thing" must obviously be taken as widely as possible, though it seems most appropriate where the contract has to do with corporeal property. We must understand by "the same thing" the whole content of the agreement, whether it consists, wholly or in part, of delivery of material objects, or payment, or other executed acts or promises. The phrase comes originally from the New York Civil Code, but it has, at all events, high judicial sanction, and the passage in which it was used by the late Lord Hannen, in the year before this Act was passed, is perhaps the best commentary on the general significance of the present section —

"It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them. *Raffles v Wichelhaus* (e)

"But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor. *Scott v Littledale* (f)

"But if in the last mentioned case the purchaser, in the course of the negotiations preliminary to the contract, has discovered that the vendor was under a misapprehension as to the sample he was offering the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr Pollock (g) cited from Paley (h) that a promise

(e) 2 H & C 906, 123 R P 833. This is a very peculiar case of an equivocal term understood in different senses by the parties. There were two ships of the same name sailing at different times. The decision was on the pleadings so that the questions of fact which might arise in the proof of such a defence were not and could not be considered.

(f) 8 F & R 815. (Note that the sale

was of a specific cargo and the seller misled the buyer, though innocently. If any one was entitled to set aside the contract it was the buyer.)

(g) Charles Pollock then Q C after wards a Baron of the Court of Exchequer and a member of the Exchequer and Queen's Bench Divisions of the High Court of Justice (died 1897).

(h) Moral and Political Philosophy,

is to be performed 'in that sense in which the promisor apprehended at the time the promisee received it,' and may be thus expressed - 'The promisor is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it' And in considering the question in what sense a promisee is entitled to enforce a promise it matters not in what way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent" (i)

Students and young practitioners must be warned not to exaggerate the working importance of cases which are quoted and discussed for the very reason that they are exceptional. Generally parties who have concurred in purporting to express a common intention by certain words cannot be heard to deny that what they did intend was the reasonable effect of those words, and that effect must be determined, if necessary, by the Court, according to the settled rules of interpretation. Whoever becomes a party to a written contract "agrees to be bound, in case of dispute, by the interpretation which a Court of law may put upon the language of the instrument," whatever meaning he may attach to it in his own mind (j). Exceptions to this rule exist, but they are admitted only for special and carefully limited reasons.

Warning is also still needed, having regard to the language current in all but the most modern text-books, against the habit of using the word "mistake" as if it denoted any general legal principle, or was capable, taken alone, of explaining any departure from the normal grounds of decision (k).

Book III Chap V Paley's rule, however, is not quite correct. The true test is not what either promisor or promisee actually thought, but the sense in which the promise would reasonably be understood by the promisee. Whately's note to Paley, *loc. cit.* and per Blackburn J in *Fowkes v Manchester and London Assurance Association* (1863) 3 B & S 917, 929, *cp* L Q R **xxi** 219

(i) Per Hannen J, *Smith v Hughes* (1871) L R 6 Q B p 609

(j) Per Lord Watson, *Stewart v Kennedy* (1890) 15 App Ca 108, 123

(k) Sir W Anson's pages on this subject (*Law of Contract*, Chap IV s 1) should be carefully read by all students. They are the most concise exposition to be found in English books of repute, and one of the most accurate

**Ambiguity.**—Sometimes an apparent agreement can be avoided by showing that some term (such as a name applying equally to two different ships) is ambiguous, and there has been a misunderstanding without fault on either side. Such cases, however, are in fact extremely rare. It usually turns out either that the terms have an ascertained sense by which both parties are bound, and there is a contract which neither can dispute, whatever either of them may profess to have thought, or that, when the facts are established, there was really never a proposal accepted according to its terms, and therefore the conditions of a binding contract were not satisfied. Many of the cases cited in the books under the head of mistake belong to the latter class, as where a broker employed to sell goods delivered to the intending vendor and the intending purchaser two sale notes describing goods of different qualities (l). “The contract,” said the Court, “must be on the one side to sell, and on the other side to accept, one and the same thing.” No such contract being shown on the face of the transaction, there was no need to say, and the Court did not say, anything about mistake. In a later case the defendant wanted to order three rifles by telegraph, and a blunder in transmitting the message turned *three* into *the*, which the plaintiff naturally took as referring to the number of *fifty* mentioned in a previous letter. Here it was held that the telegraph clerk had no authority to send the message except as it was delivered to him, so that the message as communicated to the plaintiff was not the defendant’s offer at all (m). This again, has really nothing to do with mistake in point of law. It was immaterial whether the wrong message was sent by the clerk’s mistake, or by fraudulent alteration, or through some external accident, such as a thunderstorm, affecting the instruments. Similarly if the addressee of a cipher or code message conveying a proposal misreads the proposal not unreasonably, and accepts it according to his own understanding, he cannot be held bound to the contract which the proposer intended. If the terms are really ambiguous there is nothing in such a case which either party can enforce (n).

**Fundamental error.**—In certain classes of cases there may be all the usual external evidence of consent, but the apparent consent may

(l) *Thornton v Kempster* (1814) 5  
Faunt 786 15 R R 638

(m) *Henkel v Pipe* (1870) 1 R C

(n) *Falck v Williams* [1900] A C 176  
a decision of the Judicial Committee on  
very peculiar facts

have been given under a mistake, which the party is not precluded from showing and which is so complete as to prevent the formation of any real agreement "upon the same thing" Such fundamental error may relate to the nature of the transaction, to the person dealt with or to the subject matter of the agreement

As to the nature of the transaction —A man who has put his name to an instrument of one kind understanding it to be an instrument of a wholly different kind may be entitled not only to set it aside against the other party on the ground of any fraud or misrepresentation which caused his error, but to treat it as an absolute nullity, under which no right can be acquired against him by any one In a modern case the defendant had purported to endorse a bill of exchange which he was told was a guaranty The plaintiff was a subsequent holder for value, and therefore the fact that the defendant's signature was obtained by fraud would not have protected him in this action But the Court held that his signature, not being intended as an endorsement of a bill of exchange, or as a signature to any negotiable instrument at all, was wholly inoperative, as much so as if the signature had been written on a blank piece of paper first, and a bill or note written on the other side afterwards (o) There are much older authorities showing that if a deed is falsely read over to an illiterate man, and he executes the deed relying on the false reading as being the true substance of the transaction his act is wholly void (p)

We may expect to find fraud as an element in cases of this class But it is not the decisive element A signature attached to a document supposed to be of a wholly different kind or not to contain a clause so important as substantially to alter its character is invalid unless the signer is estopped by negligence from denying that he understood what he was signing, and this 'not merely on the ground of fraud, where fraud exists but on the ground that the mind of the signor did not accompany the signature, in other words that he never intended to sign, and therefore in contemplation of law never did sign the contract

(o) *Foster v Mackinnon* (1869) L R 4 C P 704

(p) *Thoroughgood's Case* 2 Co Rep 9 b and other books cited in *Foster v Mackinnon* (to be used with some caution at this day) For later authority it

may suffice to refer to *Howatson v Webb* [1908] 1 Ch 1 and taking a rather different line *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 K B 489 both in C A The latter case was not approved by Sir W Anson L Q R xxviii

to which his name is appended' (q) Neither is fraud a necessary element The principle was applied by the High Court of Bombay, while this Act was still recent, to a case (r) where, in very peculiar circumstances, there was a misrepresentation by inadvertence, but no question of fraud There the plaintiffs, who were creditors of the defendants, sued to have the signature of their agent to a composition deed cancelled, and to have it declared that the deed was not binding on the plaintiffs The deed was signed under these circumstances the defendants' firm had suspended payment, and at a creditors' meeting it was resolved that the business of the defendants' firm should be wound up by voluntary liquidation under the supervision of a committee This resolution was confirmed at a subsequent meeting, and it was further resolved that a composition deed should be prepared in pursuance of the above resolutions No mention was made at either of the meetings of any release of the claims of the creditors After a few days a deed was tendered by one of the defendants firm to the plaintiffs' agent for execution He was then engaged with urgent English mail business, and he declined to sign it without being able to read it The debtor then earnestly pressed him to execute the document at once stating that it was of the utmost importance that no time should be lost, and adding that the deed was nothing more than an assignment to trustees for the benefit of creditors as agreed to at the creditors' meeting Upon the faith of that assurance the plaintiffs' agent executed the deed As a matter of fact the deed contained a release by the creditors to the debtors As soon as the plaintiffs' agent came to know of this he repudiated his signature and refused to be bound by the deed On behalf of the plaintiffs it was contended that the deed so far as it operated as a release was a different deed from that which the plaintiffs' agent intended to execute or thought he was executing and that his signature could not therefore be held to be a consent to its contents This argument was upheld and it was declared that the deed was not the deed of the plaintiffs so far as it purported to operate as a release to the debtors The Court proceeded further to hold that the transaction was brought about by misrepresentation within the meaning of s 18, cl 2 (which see below)

100, but the decision was unanimous See

also *Duglas v Bhanna* (1901) 3 Bom 420

(q) *Forster v Mackinnon* L R 4 C 1

at p 711

(r) *Oriental India Coy v N V Fien*

187 (18 5) 3 Bom 212

It is difficult to see why sub s 2 was more in point than sub s 1, but in any case it would seem that, having found that the supposed contract was void because there was no contract at all, the Court had no need to consider whether or not the consent, if any, was free within the meaning of s 14 (s) In a Calcutta case, where a document was signed only on the first page, but was not signed on the other pages, the executant having discovered that it was not in accordance with the terms previously agreed upon, it was held that the document was a nullity (t)

**Consent and estoppel**—The Indian Courts have followed English authority in holding that, in normal circumstances, a man is not allowed to deny that he consented to that which he has in fact done, or enabled to be done with his apparent authority Thus when a person entrusts to his own man of business a blank paper duly stamped as a bond and signed and sealed by himself in order that the instrument may be drawn up and money raised upon it for his benefit, if the instrument is afterwards duly drawn up and money obtained upon it from persons who have no reason to doubt the good faith of the transaction, it is presumed that the bond was drawn in accordance with the obligor's wishes and instructions (u) As to inchoate stamped negotiable instruments provision is made by the Negotiable Instruments Act XXVI of 1881, s 20, which is as follows—"When one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete as the case may be, upon it

(s) It will be seen in this case that the mistake as to the nature of the transaction was caused by the misrepresentation of the other contracting party Sir W R Anson suggests (Principles of the Law of Contract, p 156 17th ed) that in such a case the contract is only voidable for misrepresentation, and that it is void on the ground of mistake only if the mistake is brought about by the act of a third party This view is not supported by any English authority, and is contrary to *Oriental Bank Corporation v Fleming*

The element of truth in it is that A who has misled B, however innocently is estopped from disputing the validity of the contract as against B if it turns out to be B's interest to affirm it But still the transaction is void in the sense that even innocent third persons cannot acquire rights under it against B's will

(t) *Banku Behari Shaha v Krishna Gokind* (1903) 30 Cal 433

(u) *Wahidunnissa v Suryalass* (1879) 5 Cal 39

a negotiable instrument for any amount specified therein and not exceeding the amount conveyed by the stamp. The person so signing shall be liable upon such instruments, in the capacity in which he signed the same, to any holder in due course for such amount, provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder." As to the existence or non-existence of apparent authority in particular circumstances very delicate questions may arise under the law and practice of English company business. It would not be useful to pursue these here (t).

**Parda-nishin cases**—It might be possible to refer to this head some of the cases in which the gifts or other acts practically amounting to acts of bounty, of *parda nishin* (u) women have been set aside. But it is certainly not necessary for this purpose to show that the nature of the act was not understood at all. The jurisdiction rests on a presumption of imperfect knowledge of the world and exposure to undue influence, making it the duty of a person taking a beneficial grant or contract from a *parda nishin* woman to show that the deed was explained to her and understood by her (x) so that the ordinary burden of proof is reversed. These cases accordingly belong to the head of undue influence.

**Error as to the person of the other party**—There can be no real formation of an agreement by proposal and acceptance unless a proposal is accepted by the person, or one of a class or number of persons to whom it is made. Similarly the acceptance must be directed to the proposer, or at least the acceptor must have so acted as to entitle the proposer to treat the acceptance as meant for him. The acceptance of an offer not directed to the acceptor may occur by accident as where a man's successor in business receives an order addressed to his predecessor by a customer who does not know of the change and executes it without explaining the facts. Here no contract is formed (y). But the buyer would be bound as on a new contract.

(t) *George Whitechurch Ltd v Cavanagh* [1902] A.C. 117, *Pullen v Great Fingall Consolidated* [1901] 2 K.B. 712 C.A.

(u) The current Anglo-Indian spelling *nashin* is a mere blunder. It does not

even represent a correct transcription.

(x) *Innals Mission v The East India Co.* (1801) 2 B.R. 1018.

(y) *J. H. v. J. H.* (1877) 2 B. & S. 21, 115 L.R. 101. See also *per curiam* in

if after notice he treated the sale as subsisting (z) This kind of case is very unusual Acceptance intended for a person other than the person actually making the offer might possibly happen by accident, but in the reported cases it has been the result of fraudulent personation The proposer has obtained credit, in effect, by pretending to be some person of credit and substance known to the acceptor, or the agent of such a person In *Cundy v. Lindsay* (a), one Blenkarn closely imitated the address of a known respectable firm of Blenkiron & Co., and wrote his signature so as to look like theirs A dealer to whom he wrote to order goods thought, as Blenkarn intended, that the order came from Blenkiron & Co., and sent the goods to the address given It was held by the Court of Appeal and the House of Lords that, as the senders thought they were dealing with Blenkiron & Co., and knew nothing of Blenkarn, and had no intention of dealing with him, there was no contract, and Blenkarn acquired no property in the goods Accordingly an innocent buyer of the goods—stolen goods, as they really were—from Blenkarn had no defence to an action by the original owners Similarly, in a Punjab case, where A entered into a contract with B, a brother of C, on the representation of B that he was C himself, the Chief Court of the Punjab held that the case came within the section, and that there was no contract between A and B (b) It may be a delicate question in a case of this kind, if the transaction is between parties face to face, whether A's intent is to contract with the man then and there present whatever he calls himself, or to contract only with C, the person with whom he thinks he is dealing Some American authorities and one modern English decision (c) hold that an agreement with a person 'identified by sight and hearing' is not absolutely void though personation may render it voidable on the ground of fraud but it is submitted that, although proof that there was no intention of contracting with

Sale 6th ed 119 120 where the learned author's suggestion of some different equitable rule is not supported by his latest editors The present writer was never able to accept it

(z) See *Mitchell v. Lapage* (1816) Holt N P 253, 17 R R 633

(a) (1878) 3 App Ca 459 *Quare*, what would have been the result if by

some lucky accident the goods had been delivered to Blenkiron & Co? It seems they might have treated the goods as offered to them They could not of course, have been bound to accept them

(b) *Jaggannath v. Secretary of State* (1886) Punj Rec no 21

(c) *Hillips v. Brooks* [1919] 2 K B 243

the personator may be harder in such a case, the question is still a question of fact. On the same principle if a man is induced to apply for shares in a company by falsely representing it to be identical with an older company of like name, there is no real agreement to take the shares (d).

**As to the subject-matter of the agreement**—It is quite possible for the parties to a contract to be under a common mistake of this kind. If the mistake is not common it may happen in very exceptional cases, that by reason of an ambiguous name or the like, each party is mistaken as to the other's intention, and neither is estopped from showing his own intention (e). Otherwise a contract (assuming the other conditions for the formation of a contract to be satisfied) can be affected by such a mistake not common to both parties only where it is induced by fraud or misrepresentation. We shall find (see below on s. 18) that wilful acquiescence in the other party's mistake is equivalent to misrepresentation under certain circumstances. If the mistake is common, it can seldom, if ever, be said that there was no consent. A simpler and more correct explanation is to say that there was an agreement subject to a condition understood or implied in the nature of the agreement itself though not expressed, and that condition has not been fulfilled. It may be that at the date of the agreement the condition is already incapable of fulfilment by reason of some fact unknown to the parties as in the case of an agreement for the sale of a horse which in fact is dead or a specific cargo which in fact is lost. In that case no operative obligation ever arises under the agreement. But this may be the case with any conditional contract. The interposition of a time of suspense, during which it cannot be known whether there will be an operative contract or not can make no difference to the legal nature of the transaction. This particular class of case however is specially dealt with by s. 20 of the Act.

In many cases falling under the foregoing heads though not in all the same result may be arrived at by observing that there is no consideration for the promise which it is sought to enforce.

**Coercion wholly excluding consent**—Coercion might possibly be

(d) *Iller's Case* [1898] 1 Ch. 110.      ambrosius code message was accepted  
(e) *Ilse v. W. Helhaus* note (f)      unconditionally but in fact not in the  
J.S. above. *Fulch v. Waltons* [1900]      proposer's sense and there was no  
A.C. 176 where an offer made by an      contract.

such as not only to prevent consent from being free (ss 14, 15), but to ss exclude any real or intelligent consent altogether. In two English cases of our own time marriages have been declared void, in extremely peculiar circumstances, on the ground of combined fraud and coercion having operated on the pretended wife to such an extent that the marriage was not her voluntary act (*f*). No case of this kind is known to have occurred in the region of ordinary contract.

14.—Consent is said to be free when it is not caused by—

Free consent  
defined

(1) coercion, as defined in section 15, or

(2) undue influence, as defined in  
section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake subject to the provisions of sections 20,  
21, and 22

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

**Unfree consent**—Not only consent but free consent is declared by s 10 to be necessary to the complete validity of a contract. The Act now proceeds to declare the meaning of this addition. Where there is no consent or no real and certain object of consent (*cf* s 29 pp 228, 229, below) there can be no contract at all. Where there is consent but not free consent there is generally a contract voidable at the option of the party whose consent was not free. This section declares in general the causes which may exclude freedom of consent leaving them to be more fully explained by the later sections referred to in the text. In one respect the language is open to objection. It seems, when read together with that of other relevant sections to assume that there are cases in which a contract is voidable on the ground of mistake. We are not aware of any such cases. We have seen that certain kinds of mistake may exclude consent altogether. In such cases no real agreement is ever formed or there is no real object on which the parties are agreed and the seeming agreement is wholly

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(*f*) *Salter v Seligman* (1886) 121 D 21. woman thought the ceremony was only a  
*Lord v Sher* (1896) 111 where the betrothal

## THE INDIAN CONTRACT ACT.

- (a) where he holds a real or *apparent authority* over the other, or where he stands in a fiduciary relation to the other; or
- (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable (g), the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872.

### *Illustrations*

(a) A, having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence (r).

(c) A, being in debt to B, the money lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

This section was substituted for the original s. 16 by the Indian Contract Act Amendment Act VI of 1899, s. 2.

(g) This condition is essential for throwing the burden of proof on the person who is in a dominating position. Otherwise the actual use of that position must be proved as a fact: *Prasannaiah v. Kannaiah* (Kottar) (1919) L. R. 47

I. A. 1; 47 Mad. 450; 55 I. C. 417; *Mahmud un Nissa v. Larkat ulah* (1926) 48 All. 666; 99 I. C. 684.

(r) *Dalia Farm v. Singh* (1927) 102 I. C. 707, A. I. R. 1927 Lah. 576

The section before it was amended stood as follows —

Undue influence' is said to be employed in the following cases —

(1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other makes use of such confidence or authority for the purpose of obtaining an advantage over that other which but for such confidence or authority he could not have obtained

(2) When a person whose mind is enfeebled by old age, illness or mental or bodily distress is so treated as to make him consent to that to which but for such treatment he would not have consented although such treatment may not amount to coercion

There were no illustrations appended to the old section. Illustrations (a) and (b) of the present section are elementary laws (s). They were intended to be added to the section in its original form but for some reason withdrawn before the Act was passed. Illustrations (c) and (d) are evidently intended to explain the application and the limits of para 3

**The doctrine of Undue Influence in England** — The equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud (t). It applies alike to acts of pure bounty by way of gift and to transactions in the form of contract which are clearly more advantageous to one party than to the other. In combination with other special rules it may even be applied to transactions which do not show on the face of them any unfair advantage. The sixteenth section of the Act as it stood till 1899 did not adequately represent the generality of the English doctrine. In fact however one at least of the Indian High Courts acted boldly and beneficially on the general principles of English equity without fettering itself by the precise words of the Act. Another defect now remedied was that nothing was said in the Contract Act about the important question of burden of proof and magistrates and practitioners were left to discover

(s) As to the relation between (1) and (2) above (a) become unimpeachable by subsequent confirmation. *Mitchell v Home* (1831) 4 M. & Cr. 948. *Gray* (1881) 8 Q. B. D. 587.

(t) *Lanley v. F. in Allcard v. Skinner* (1885) 36 Ch. D. 140. 183.

for themselves that the real working strength of this section could be understood only by reading it with s. 111 of the Evidence Act (u)

The English authorities are numerous, and many of them are complicated by questions on the one hand of actual fraud (v) or on the other hand of breach of some special duty, such as that of an agent, which is independent of the state of mind of the parties. It will be sufficient for the present purpose to refer to a few of the leading authorities on the various points dealt with by the test of the Act. The first paragraph of the section lays down the principle in general terms; the second and third define the presumptions by which the Court is enabled to apply the principle. It is obvious that the same power which can "dominate the will" of a weaker party is often also in a position to suppress the evidence which would be required to prove more constraint in a specific instance. Modification of the ordinary rules of evidence is accordingly necessary to prevent a failure of justice in such cases. Where the special presumptions do not apply, proof of undue influence on the particular occasion remains admissible, though strong evidence is required to show that, in the absence of any of the relations which are generally accompanied by more or less control on one side and submission on the other, the consent of a contracting party was not free. In the case of a pure voluntary gift (though there is no general presumption against the validity of gifts) the proof is less difficult, but this is not within our subject.

**Sub-s. 1: Undue Influence generally.**—The first paragraph gives the elements of undue influence—a dominant position and the use of it to obtain an unfair advantage. The words "unfair advantage" must be taken with the context. They do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing. "The principle applies to every case where influence is acquired and abused where confidence is reposed and betrayed" (w), or, as Sir Samuel Romilly expressed it in his

(u) Even now the rule as to burden of proof seems not to be always understood, see *Saflarali v. Nur Mahomed* (1929) 118 I. C. 737, 740; A. I. R. 1930 Sind 25.

(v) For a curious case of this kind, adding nothing to the law, see *Salger Pravel v. Har Narain Dass* (1924) 411

I C 817, A I R 1929 Oudh 44. The judgment reviews the history of Sikh schisms and controversies.

(w) Lord Kingsdown in *Smith v. Kay* (1839) 7 H. L. C. 770, at p. 770. This was a case of general control obtained by an older man over a younger one during his minority without any spiritual

celebrated argument in *Huguenin v Baseley*, which has been made authoritative by repeated judicial approval (x), "to all the variety of relations in which dominion may be exercised by one person over another" "As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties" (y) But the English cases on the subject have been said by the same authority to be divisible into two groups, according as the charge against the donee (to use this word for shortness' sake) was of aggressive circumvention or of abusing the opportunities given by a duty

"First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor

"The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor or even to manage his property for him In this class of cases it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made" (z)

**Sub-s. 2 : Different forms of influence.**—The second paragraph of the present section makes a division of the subject matter on a different principle, according to the origin of the relation of dependence, continuing or transitory, which makes undue influence possible Such a relation may arise (a) from a special authority or confidence committed to the donee, or (b) from the feebleness in body or mind of the donor However, it is impossible to find plain and clear cut categories for transactions which are often obscure and complicated, and sometimes purposely made so. Practically the most important thing to bear in mind is that persons in authority, or holding confidential employments such as that of a spiritual, medical, or legal adviser, are called on to act with good faith and more than good faith in the matter of accepting any benefit (beyond ordinary professional remuneration for professional

influence or other defined fiduciary Ch 752  
relation

(x) (1807) 14 Ves 285, 9 R. R. 283,  
49 R. R. 102, per Wright J [1893] 1

(y) Lindley L. J. in *Allcard v. Skinner*

(1887) 36 Ch. Div. at p. 183

(z) 36 Ch. Div. at p. 181

work done) from those who are under their authority or guidance. In fact, their honourable and prudent course is to insist on the other party taking independent advice (a). Following these principles, the High Court of Allahabad set aside a gift of the whole of his property by a Hindu well advanced in years to his *guru*, or spiritual adviser, the only reason for the gift as disclosed by the deed being the donor's desire to secure benefits to his soul in the next world (b). Similarly, where a *cestui que trust* had no independent advice, it was held that a gift by him to the trustee of certain shares forming part of the trust funds was void, though in the same case a gift of shares which did not form part of the trust funds was upheld (c). The case of *Wajid Khan v. Dwar Ali* (d), in which the Judicial Committee set aside a deed of gift executed by an old illiterate Mahomedan lady in favour of her confidential managing agent, comes under this head. And so does the case in which the High Court of Bengal refused to enforce an agreement executed by a poor woman in favour of her *mookhtear* by which she bound herself to give him, by way of remuneration for his services, one half of the property which she might recover by his assistance (e). The same principles apply to agreements for remuneration between an attorney and a client (f) and between a managing clerk in an attorney's office and a client (g). A parent stands in a fiduciary relation towards his child and any transaction between them by which any benefit is procured by the parent to

(a) In the case of a gift from client to solicitor it is an essential condition to the validity of the gift that the client should have competent independent advice. *Jiles v. Terry* [1890] 2 Q. B. 679, C. A., following and explaining *Jholes v. Jate* (1865) 1 R. 1 Ch. 202 and other earlier authorities, and the Court must also be satisfied that the influence has in fact ceased. *Bright v. Carter* [1903] 1 Ch. 27. It is hardly too much to say that such a gift, whatever it may be in form is practically voidable. The principle of *Jiles v. Terry* was followed in *Tajul Pajumma Idris v. Salamatyysa* (1891) 5 M. L. J. 231 and *Sanatulla Baita Chandra v. Chandra Subbaraj Guru* (1921) 12 J. C. 682, 1929 M. L. W. N. 300.

(b) *Hannu Singh v. Chaita Dada* (1880) 12 M. 523.

(c) *Tajhunath v. Varjivan Das* (1906) 30 Bom. 578. *Knight v. Maryribank* (1849) 2 M. & G. 10, 2 H. & T. 308. As to purchase by a trustee from a beneficiary see *Indian Trusts Act 1882*, s. 53.

(d) (1891) 18 Cal. 515, 1 I. 18, 1 A. 141.

(e) *Dushay v. Mani Hilsaram* (1888) 1 H. I. R. A. C. 97.

(f) *Lejandra Nath v. Srimoy Juckerj Money* (1901) C. C. W. N. 816. *Ahamadulla Dada v. Lalchurno Dada* (1908) 36 Cal. 413.

(g) *Harnalal Dada v. Datta J. J.* (1902) 20 Bom. 681.

himself or to a third party at the expense of the child will be viewed with jealousy by courts of equity and the burden will be on the parent or third party claiming the benefit of showing that the child in entering into the transaction had independent advice that he thoroughly understood the nature of the transaction and that he was removed from all undue influence when the gift was made. Upon these principles the High Court of Madras refused to enforce against an adopted son a deed of trust of joint family property executed by him and his adoptive father whereby annuities were created in favour of certain relations of the father in a suit brought by them after the father's death to recover arrears of annuities. The deed was executed by the son soon after he attained majority and there was no evidence to show that the son had independent advice or that he understood the nature of the transaction or that his father's influence had ceased when the document was executed (h). The relations subsisting between a *malik* and a cultivator are such that the *malik* is in a position to dominate the will of the cultivator (i). But the presumption of undue influence does not apply to a gift by a mother to her daughter. If such a gift is sought to be set aside on the ground of undue influence the burden lies upon those who seek to avoid it to establish domination on the part of the daughter and subjection of the mother (j). Age and capacity are important elements in determining whether consent was free in the absence of any confidential relation but as against the presumption arising from the existence of such a relation they count for very little (k). Clause (b) of this paragraph seems to include the principle established by a series of English decisions that where a purchase is made from a poor and ignorant man at a considerable undervalue the vendor having no independent advice a court of equity will set aside the transaction (l). Infirmary of body or mind on the vendor's part will make it still more difficult to uphold any such contract. There is no absolute rule as to the necessity or sufficiency of independent advice. It is not the only possible proof of a

(h) *Laksh Doss Roop Lall* (190) 30 Mad 169 on app from 29 Mad 1

(i) *Kashi Nath Durga Prasad* (1916) 1 Lat L J 604 As to transaction between a guardian and a ward see *Guardian and Wards Act 1890* s 20

(j) *Isna ul Husayn Hafiz Bori* (1906) 33 Cal 3 L R 33 I A 86

(k) *Rhodes v Bate* L R 1 Ch at p 90

(l) *Per Kay J Fry v Lane* (1888) 4 Cl D 313 the latest reported case of this class

donor's competence and understanding, on the other hand advice relied on to support the transaction must not only be independent, but "must be given with knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor" (w). As to the effect of inadequacy of consideration see s 25, expl 2, p 191, below

*Mental distress.*—"A state of fear by itself does not constitute undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement." The mere fact, therefore, that a submission was executed by the defendant during the pendency and under fear of a criminal prosecution instituted against him by the plaintiff will not avoid the transaction on the ground of "undue influence." It was so held by the High Court of Allahabad (n) in a case decided under the old section. The decision would, it seems, be the same under the section as it now stands. It could not be said in the case above that the plaintiff was in a position to dominate the will of the defendant merely by reason of the fact that criminal proceedings had been pending against the defendant at the time when the submission was executed by him, but assuming that he was there is nothing to show in the facts of the case that the plaintiff used any such position to obtain an unfair advantage over the defendant. "The law says that (1) not only the defendant must have a dominant position, but (2) he must use it" (o). Both these elements were present in the case where the High Court of Madras refused to enforce an agreement entered into by a Hindu widow to adopt a boy to her husband, it appearing on evidence that the relatives of the boy obstructed the removal of her husband's corpse from the house unless she consented to the adoption (p). The same elements are also to be found in the case where the Allahabad High

(m) *Inche Norish & Shah v. The Bin Owar* [1929] A.C. 127, 135. Cf. the other judgments of the Judicial Committee cited at pp. 105, 106, below, and *Jas. Surran J. v. J. & J. J. J.* (1929) 5 Pat. 110 (41) 91 I.C. 782, A.I.P. 1929, Pat. 782, where the substantial question was of Hindu law.  
(n) *J. & J. J. J. v. J. & J. J. J.*

(1900) 22 All. 221. See also *Majid v. Musammil Syah* (1882) P.M.J. Per. no. 135.

(o) *Ampleman v. J. & J. J. J.* (1915) 42 Cal. 28. See also *B. v. J. & J. J.* (1917) 21 Cal. 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(p) *Langdon v. J. & J. J.* (1889) 13 M.J. 111.

Court set aside a deed of gift executed by an indigent Brahman to a temple of which the defendant had charge, it having been found that the gift left the donor without any means and that the defendant had motives of personal gain in procuring it. The gift was made while the donor was living in the defendant's house, where he was fed and maintained by him and during the pendency of a suit to recover the property prosecuted by the defendant on behalf of the donor at his own expense (q).

In a Madras case where the plaintiffs agreed to relinquish their right to a religious office in favour of the defendant in consideration of the latter withdrawing a charge of criminal trespass preferred against them it was held that the agreement was voidable, the charge of trespass being false, and the sole cause for entering into the agreement being "the well founded terror of the influence of the prosecutor and of the civil death which would probably result from his proceedings" (r). Similarly where criminal proceedings were threatened against a *mooladam* for misappropriation of his master's moneys and a bond was passed by an ignorant Hindu widow who had brought him up as her son to save him from the threatened prosecution, it was held that the agreement was not binding upon the widow she having had no independent advice (s). See s 19A ill (a).

**Proof of undue influence**—In dealing with cases of undue influence there are four important questions which the Court should consider, namely (1) whether the transaction is a righteous transaction that is whether it is a thing which a right minded person might be expected to do (2) whether it was improvident that is to say, whether it shows so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing, (3) whether it was a matter requiring a legal adviser, and (4) whether the intention of making the gift originated with the donor (t). All these are questions of fact (u).

(q) *Sital Prasad v Parbhu Lal* (1888) 10 All 535

(r) *Pudshary Krishneu v Karampally* (1874) 7 M H C 378

(s) *Kessourji v Hurjiwan* (1887) 11 Bom 566. See also *Rangnath v Govind* (1904) 28 Bom 639

(t) Per Lord Macnaghten in *Malomed Bilsh v Hosseini Bibi* (1888) 15 Cal

684 at pp 698-700 L R 15 I A 81, at pp 92-93. These questions obviously do not arise where there is neither proof nor presumption of any one's influence, see *Leitchram Ajar v Krishnammal* (1917) 51 Mad L J 20, 39 I C 571, A I R 1927 Mad 255

(u) There is really no law in e.g. such a case as *Narajana Doss Balakrishna v*

Transactions with Parda-nashin women—From a time before though not long before, the passing of the Contract Act, some of the High Courts, with a certain amount of support from the Judicial Committee, have treated *parda nashin* women (sometimes in terms only Hindu women, but in fact those concerned are not always Hindus) as a class of persons specially exposed to undue influence, and have gone near to laying it down as a rule of law that every one dealing with a *parda nashin* woman is bound to show affirmatively that she understood the nature of the transaction, and that the terms were fair. The rule was stated by the late Sir W. Rattigan in a paper where he forcibly criticised this policy (*v*), to have been first announced in 1867 in a Calcutta case not regularly reported. "It does not necessarily follow," Sir W. Rattigan observed, "that a native woman simply because she sits behind the *parda*, is to be placed in the same category as the 'weak, ignorant and infirm persons' whom the Court of Chancery, under a proper interpretation of its approved practice is accustomed to protect. On the contrary, it is common experience to find in India *parda* ladies who are highly intelligent, strong minded and who possess excellent business capacity, and contrive to manage large estates with great success. To adopt a sweeping generalisation and to hold that every *parda nashin* lady who enters into any commercial transaction or who makes a disposition of her property is presumably the victim of undue influence is to make an assumption which is contrary to actual facts and to cause the law to be abused for the purpose of voiding *bona fide* engagements."

In the earliest Privy Council decision on the subject where a Mahomedan lady sued to recover from her husband the value of Company's paper of a considerable amount alleged to have been endorsed and handed over to him to receive interest thereon and the defence was that he had purchased the paper from his wife it was held by their Lordships that though the wife failed to prove affirmatively the precise case set up by her in the plaint the burden of proof was upon the husband to show, the plaintiff being a *pardan masha* that the sale was a *bona fide* one for value and that upon the evidence he had

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failed to capture the burden (w). A few years later it was declared by the same tribunal that "as regards deeds taken from *parda* women, the Courts have always been careful to see "that the party executing them has been a free agent, and duly informed of what she was about" (z). It is not sufficient to show that a document executed by a *parda* nishin woman was read out to her, it must further be shown that it was explained to her or that she understood its conditions and effect (y), and the explanation must include all material points as well as the general nature of the transaction (z). The reason is that the ordinary presumption that a person understands the document to which he has affixed his name does not apply in the case of a *parda* nishin woman (a).

The law as to the burden of proof is summarised in a decision of the Judicial Committee (b). In the first place, the lady was a *parda* nishin lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest not with those who attack but with those who found upon

(u) *Moomjee Buzloor Pakeem v Akummoniam Begum* (1867) 11 M I A 531. A mortgage of property belonging to male and female members of a Mahomedan family by the males does not operate as a transfer of the interest of the females, because the management of the properties is left in the hands of the males. *Azima Bibi v Shamalanarat* (1913) 40 Cal 378 [P C].

(z) *Getesh Chunder v Bhuggadutt* (1870) 13 M I A 419, 431. *Salsati Lal v Shidarat Kaur* (1881) 7 Cal 245, L R 8 I A 31. *Bihari Lal v Habiba Bibi* (1886) 8 All 267. *Ananda Mohun Rai v Bhuben Mohini Devi* (1901) 25 Cal 546, L R 28 I A 71.

(y) *Shambati Koeri v Jagu Bibi* (1902) 29 Cal 749, 29 I A 127. *Sham Koer v Dik Koer* (1901) L R 29 Cal 664. L R 29 I A 132. *Mirza Sybil Hassan v Nawab Barir Ali Khan* (1912) 39 I A 156, *Kali Bikkh v Pam Gopal* (1914) L R 41 I A 23, 29, 36 All 81, 89, 21 I C 985, *Sri Kishan Lal v Kashmira* (1916) 14 All L J 1236, 34 I C 37, 124 [P C]. *Sumedlin v Abdul* (1907) 31 Bom 165.

(z) *Farid un Nisa v Mukhtar Ahmad* (1925) L R 52 I A 342, 89 I C 619, A I R 1925 P C 204, cp *Barla tumiam Begum v Delti Bikkh*, also a P C appeal (1927) 31 C W N 103, 25 All L J 314, 101 I C 29, A I R 1927 P C 81 followed *Pam Sundar Sahay Jay Kumar Sen Chowdhury* (1927) 35 Cal 285, 101 I C 527, A I R 1927 Cal 889 in the case of a man said to be of weak intellect who was held on the evidence to have been sufficiently informed and protected.

(a) *Lahar Ali v Delraw Bano Begum* (1877) 3 Cal 324. *Mariam Bibi v Sakina* (1892) 14 All 8. *Teekhan Kuar v Thilur Das* (1895) 17 All 125. *Hadi Lal v Musunmat* (1903) Punjab Rec. no 77. In *Ashar Ali's* case the Judicial Committee set aside a *tauhmatnam* executed by a Mahomedan lady on the false representation that the effect of the document was what she desired. The case looks very like one of positive fraud.

(b) *Kali Bikkh v Pam Gopal* (1914) L R 41 I A 23, 28, 29, 36 All 81, 89, 21 I C 985, *Farid un Nisa v Mukhtar Ahmad* (1925) I R 52 I A 342, 89 I A

the deed, and the proof must go so far as to shew affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset."

More lately, on an attempt to repudiate a *parda-nishin* lady's compromise of a litigated family dispute, Lord Buckmaster said (c) : "It is not necessary—indeed, it is undesirable—to insist in such cases upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities. It is sufficient that the general result of the compromise should be understood, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter advise the lady that the deed should be executed."

Some Indian decisions suggest that a deed of gift by a *parda-nishin* woman is invalid in the absence of proof that she had independent advice. But in *Kali Bakhsh v. Ram Gopal* (d) the Judicial Committee held that there is no rule of law of the absolute kind above indicated. "The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out the transaction. If she did the issue is solved and the transaction is upheld. But if upon a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor, as well as the approximate circumstances affecting the execution—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result then the deed ought to stand. The present, in their Lordships' judgment, appears to be a case of that kind." In short their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a *parda-nishin* lady, they cannot transmute such a legal protection into a legal disability. She might, especially if the outside adviser had been a lawyer, have altered the shape or form of the transaction. But in substance and result she would have carried out the same purpose and will as are expressed by the deed under challenge. They refer to the judgment of Lord Macnaghten in *Mahomed Bakhsh Khan v. Hussain Bibi* (e). See p. 101 above.

649, A I R 1025 P C 204, *Mahomed Ibrahim v. Umratullah Jan* (1917) Punj Rec., no. 60, p. 370, 3 F I C 798.

(c) *Sunatibibi Debi v. Dhira Sundari Debi* (1910) L. R. 46 I A 272, 278.

(d) (1914) L. R. 41 I A 23, 30 All 81. (In this case the I C upheld a gift by a *parda-nishin* woman of about one

half of her estate to her paramour's son on the ground that there was no undue influence). *Keshab Lal v. Lila Purnan* (1913) 17 C W N 901. *Mahabir Prasad v. Taj Begum* (1915) 19 C W N 102.

(e) (1888) L. R. 15 I A 81, 15 Cal 481. In this case the charge of undue influence was discredited by being

## PARDA-NISHIN CASES.

It should be noted that the undue influence which may affect a *parda nishin* lady's understanding of a document may proceed from a third party. It was so held by Jenkins C J in a case where a mortgage of her property by a *parda nishin* lady to a creditor of her husband was set aside the undue influence having proceeded from the husband (f)

It appears that most, if not all, of the decisions could have been arrived at without the aid of any general presumption, on such grounds as that the act was done under the influence of marital control, or actual fraud or misrepresentation, or even in total ignorance of its nature and effect. The only thing in English law that seems analogous to the treatment of a *parda nishin* woman's dealings as presumably invalid is the treatment of dealings with "expectant heirs" by Courts of Equity, where fraud is said to be "presumed from the circumstances and condition of the parties contracting." But this equitable doctrine is peculiar, and depends, in part at any rate on reasons not existing in India (g)

**Who is a Parda-Nishin.**—The expression "*parda nishin*" connotes complete seclusion. It is not enough to entitle a woman to the special care with which the Courts regard the disposition of a *parda nishin* woman that she lives in some degree of seclusion (h). Thus a woman who goes to Court and gives evidence, who fixes rents with tenants and collects rents, who communicates, when necessary, in matters of business, with men other than members of her own family, could not be regarded as a *parda nishin* woman (i). In *Hodges v The Delhi and London Bank, Limited* (j), a Privy Council case it was said "It is abundantly clear that Mrs Hodges was not a *parda nishin*. The term *quasi parda nishin* seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the *parda nishin* class, is yet so close to them in kinship and habits and so secluded from ordinary social intercourse that a like amount of

made as an afterthought and not by the lady herself who was the original plaintiff but by her representative after her death. *Cp Barkatunnissa Begum v Debi Bakhsh* (1927) 31 C W N 693, 101 I C 29 V I R 1927 P C 84

(f) *Badiatunnissa Bibee v Anbika Charan* (1914) 18 C W N 1133. *Com pure Bank of Montreal v Stuart* [1911] A C 120

(g) See Pollock, Principles of Contract,

9th ed. 670 sqq. *O'Rourke v Dingbroke* (1877) 2 App Ca 814 marks the limit of its application

(h) *Shah Ismail v Amirbibi* (1902) 4 Bom L R 146 148

(i) *Ismail Munesjee v Haji Bn* (1906) 33 Cal 773 783, L R 33 I A 86, *Shah Ismail v Amirbibi* (1902) 4 Bom L R 146

(j) (1901) 23 All 137, 145, I R 27 I A 168

incapacity for business must be ascribed to her, and the same amount of protection which the law gives to *parda nishins* must be extended to her. The contention is a novel one, and their Lordships are not favourably impressed by it. As to a certain well known and easily ascertained class of women, well known rules of law are established, with the wisdom of which we are not now concerned, outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute."

**Sub-s 3: Rule of evidence**—The third paragraph of the present section does not lay down any rule of law, but throws the burden of proving freedom of consent on a party who, being in a dominant position, makes a bargain so much to his own advantage that, in the language of some of the English authorities, it "shocks the conscience." Money lending cases are those chiefly contemplated (see illustration (c)). It must not be supposed, however, that there may not be other forms of unconscionable bargain within the mischief and the remedy of this enactment (22)

**"Unconscionable bargains"**—Illustration (c) contemplates the case of a person already indebted to a money lender contracting a fresh loan with him on terms on the face of them unconscionable. In such a case a presumption is raised that the borrower's consent was not free. The presumption is rebuttable but the burden of proof is on the party who has sought to make an exorbitant profit of the other's distress. The question is not of fraud but of the unconscientious use of superior power. Inadequacy of consideration though it will not of itself void a contract (s. 25 expl. 2 p. 191 b l w) has great weight in this class of cases as evidence that the contract was not freely made. Inadequacy of consideration in conjunction with the circumstances of indebtedness and ignorance were facts from which it would have been as permissible before the amendment of [this section] to infer the use of undue influence as it would be since that amendment (k). Relief in cases of unconscionable bargains is an old head of English equity. It was formerly associated in a special

(22) *17 Tatorj Mission v. Trustees* (1) *14 India Digest* 183, 184 (1879) 123 F. C. 177. A. F. J. 170. *See also* 123 F. C. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

manner with sales of reversionary interests, which the Court was eager to restrain, and for some time it was the doctrine of the Court that a sale of any reversionary interest, if proved to have been made for only a little under the value must be set aside without further inquiry. This rule was at last found so inconvenient that it was abolished by statute. But the general principles of equity in dealing with what are called "catching bargains" remain and the third clause of the section now before us is apparently intended to embody them. In fact the Indian High Courts had acted on these principles both before and since the passing of the Contract Act without any express authority of written law. Thus where the interest was exorbitant, relief was granted by reducing the rate of interest in cases where the loan was made to an illiterate peasant (l) and to a Hindu sixteen years old (m) (but not a minor according to the Hindu law). And where an heir to an estate borrowed Rs 3700 to enable him to prosecute his claim at a time when he was without even the means of subsistence and gave the lender a bond for Rs 25000 to be paid after receiving possession of the property the Court held that the bargain was hard and unconscionable and gave the lender a decree for Rs 3700 with interest at 20 per cent per annum (n). Acting upon the same principles the High Court of Bombay held that a covenant in a mortgage executed by illiterate peasants in favour of a money lender to sell the mortgaged property to the mortgagee at a gross undervalue in default of payment of interest was inequitable and oppressive and the mortgage was set aside to that extent (o). After the amendment of the present section the High Court of Allahabad disallowed compound interest payable at 2 per cent per mensem with monthly rests in the case of a bond executed by a spendthrift and a drunkard eighteen years old (p). And where a

(l) *Lall v. Pam Prasad* (1886) 9 All 74. See also the observations of the Judicial Committee in *Kamini v. Kal Goswami* (1880) 12 Cal 200-239 L R 12 I A 215 where the loan was made to a *parda nish* lady.

(m) *Mahoomoh n. Ioy v. Soorendro Varain Deb* (1870) 1 Cal 108. The Indian Majority Act which fixes the age of majority at eighteen was passed on 2nd March 1875.

(n) *Chunni Har v. Puri Singh* (1888) 11 All 57 confirmed on appeal *sub nom. Raja Mohkam Singh v. Raja Puri Singh* (1893) 15 All 307 20 I A 12. See also *Husan Lalshah v. Rahmat Husain* (1888) 11 All 108.

(o) *Kedari Ben Janu v. Atmaranbhat* (1866) 3 B H C A C 11.

(p) *Kirpa Pam v. Sa'ud-din* (1903) 20 All 984.

person twenty eight years old, the son of a wealthy father, but of profligate habits and greatly in need of money, his father having refused to provide him with any money executed a bond to secure a sum of Rs 500 with interest at the rate of Rs 37 8 0 per cent per annum with six monthly rests, with a stipulation that the borrower should not be empowered to pay the money within three years and if he did pay within three years, he should nevertheless be obliged to pay three years interest at the rate above mentioned, the same Court held that the bargain was unconscionable and gave the lender a decree for Rs 500 with simple interest at the rate of 24 per cent per annum (q) Where a poor Hindu widow borrowed Rs 1 500 from a money lender at 100 per cent per annum for the purpose of enabling her to establish her right to maintenance, the High Court of Madras allowed the lender interest at 24 per cent (r) Similarly, where a talukdar who had been declared a "disqualified proprietor" under the provisions of the Oudh Land Revenue Act, 1876 and whose property was placed in the charge of the Court of Wards on the ground of his indebtedness and consequent inability to manage it executed a bond for Rs 10 000 repayable with interest at 18 per cent per annum, and compound interest in default of payment of instalments the Judicial Committee disallowed compound interest on the ground that the position of the parties was such that the lender was "in a position to dominate the will" of the borrower, and that the charging of compound interest in the circumstances of the case was "unconscionable" (s) The relief, however, has not been confined to money

(q) *Balkishan Das v. Malan Lal* (1907) 23 All 303 Doubtful in *Akshul v. Arithul* (1913) 31 Mad 533 at p 537, 22 I C 761

(r) *Janice Arayam v. Suresanatha* (1910) 34 Mad 7 See further as to the test of what is excessive *Bin Mulani v. Balraj Nath* (1905) 120 I C 417 Exact definition is not possible *Imli Ashun Das v. Binai Singh* (1929) 116 I C 43 10 P 1 T 322 A 11 1929 Pat 340

(s) *Dhanraj Das v. Maneshkar Balkish Singh* (1906) 28 All 370 I R 33 I A 118 *Maneshkar Balkish Singh v. Balkish Lal* (1907) 31 All 286 I J 31 I A 96 The same principle has

been applied where two persons who were under arrest for non payment of Government revenue obtained from the talukdar temporary relief to get to a money lender and subsequently borrowed Rs 500 from the money lender and executed a mortgage bond bearing compound interest at the rate of 3 1/4 per cent per annum with half yearly rests In a suit by the money lender to recover the amount the Court held that the bargain was unconscionable and allowed 18 per cent compound interest *Lall Singh v. Balkish Das* (1910) 7 All I J 111 *Balkish Das v. Akshul Arithul* (1913) 42 Cal 101 20 I C 812 10 D

lending transactions, and so far back as the year 1874 the Judicial Committee set aside a sale obtained by a powerful and wealthy banker from a young man, but who had just attained his majority, and had no independent advice, by threats of prolonging litigation commenced against him by other persons with the funds and assistance of the banker (t). Three years later the same tribunal set aside an *ikrar-nama* executed by a minor and another who had just come of age of half of their property in favour of the defendants who had no title to the property, and who had taken possession thereof by show of force and with the assistance of a large body of retainers (u). Similarly, where the plaintiff, an illiterate agriculturist heavily indebted to the defendant, who was a money lender, passed a sale-deed to the defendant of his lands worth thrice the amount of the debt under pressure of payment, the High Court of Bombay ordered by its decree that the sale should be set aside on the plaintiff paying to the defendant the debt owed by him within a fixed period (v). But the question whether a transaction should be set aside as being inequitable depends upon the circumstances existing at the time of the transaction, and not on subsequent events (w).

As between parties on an equal footing high interest and even the holding of securities for a greater sum than has been actually advanced, will not suffice to make the Court hold a bargain unconscionable. Where both the parties to a mortgage were money lenders and the mortgage purported to be a security for Rs. 5,000 as principal and Rs. 1,250 *sauca* in lieu of interest repayable by seventy two instalments, it was held that though the interest on an instalment in arrear was to run at 24 per cent per annum and though the mortgagee retained Rs. 100 on account of *khichadi* (bonus) out of the Rs. 5,000 purporting to have been advanced to the mortgagor, the transaction was not unconscionable, regard being had to the fact that it was the practice of the mortgagor himself to make advances on similar terms (x).

approved by the Judicial Committee, *Rag hunath Prasad v. Sarju Prasad* I R 51 I A 101, 108, 82 I C 817, A I R 1924 P C 60.

(t) *Chedambara Chetty v. Penja Krishna Muthu* (1874) 13 B L R 503, L R 1 I A 241.

(u) *Prem Narain Singh v. Parasram Singh* (1877) 4 I A 101.

(v) *Bharibhat v. Jeshwantrao* (1901) 25 Bom 126.

(w) *Ganga Bakh v. Jagat Bahadur Singh* (1895) 23 Cal 15, I R 22 I A 153.

(x) *Hari Lahu Patil v. Ramji Lalil Panlu* (1904) 28 Bom 371. As to the rate of interest, cp *Lala Billa Mal v. Alil Billa* (1919) 21 Bom L R 579,

Similarly, though the agreement be by a mortgagor for sale of his equity of redemption to the mortgagee upon onerous terms, the Court will not therefore refuse specific performance if the bargain is not unconscionable and there is no evidence to show that the mortgagee took an improper advantage of his position or of the mortgagor's difficulties (y)

On examining the cases relating to money lending transactions cited in the preceding paragraph, it will be observed that in each of them the lender was "in a position to dominate the will" of the borrower, and the bargain was "unconscionable" within the meaning of cl (3) of the present section. It is only the concurrence of these two elements that can justify the Court in granting relief to the borrower (z). The mere fact that the rate of interest is exorbitant is no ground for relief under this section (a) unless it be shown that the lender was in a position to dominate the will of the borrower. And it is now finally held by the highest tribunal that urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of this section (b). In fact, even before the decision of the Privy Council, the Courts of India consistently declined to interfere except in two cases which must now be taken as overruled (c) where relief was

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claimed against an exorbitant rate of interest on the ground that the borrower was in urgent need of money. Upon the same principle the fact that a person parts with his properties for what he considers an unduly low price owing to his pressing necessities is not a ground for setting aside the alienation, unless it be shown that the alienor was in a position to dominate the will of the alienor (d) "If people with their eyes open choose wilfully and knowingly to enter into unconscionable bargains, the law has no right to protect them" Hardship alone is not enough (e) The law on this subject, however, has been considerably altered since the enactment of the Usurious Loans Act, 1918

In cases under this section, English decisions are to be resorted to only so far as they illustrate the express terms. This warning was given by the Judicial Committee in *Dhanpal Das v Maneshar Bakhsh Singh* (f) "The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered the terms of the amended section 16 only. He also mistook the English law. Apart from a recent statute, an English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud. In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case."

**Lapse of time and limitation**—Delay and acquiescence do not bar a party's right to equitable relief on the ground of undue influence, unless he knew that he had the right, or, being a free agent at the

1 It is only the judgment is given it is impossible to say whether on the facts the decision was or was not justified

(d) *Sundarambal v Yogavinnagarikkal* (1911) 38 Mad 850, 23 I C 72

(e) *Mackintosh v Wingrove* (1879) 4 Cal 137. *Satish Chunder v Hem Chunder* (1902) 29 Cal 823. *Imresh Chandra v Gajip Lal* (1903) 31 Cal 233. *Arts Chandra v Atkinson* (1905) 30 C W N 140. *Tarnakand v Chandra Lal* (1889) All W N 167. *Hem Paj v Akhuts Palkh* (1905) Punj Pec no 13, 4. *Akhan v Dasi Chandi* (1918) Punj

Rec no 101 p 334. 48 I C 933. *Bhat Nath Chatterjee v Rama Nath Vaskar* (1921) 48 Cal 93. 57 I C 1004

(f) (1906) 28 All 570. I P 33 I A 118. The relief granted below was substantially confirmed on the ground that the facts brought the case within the section. The borrower was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards and the lender used his position to demand more onerous terms than were reasonable

time, deliberately determined not to inquire what his rights were or to act upon them (g) Lapse of time is not a bar in itself to such relief There must be conduct amounting to confirmation or ratification of the transaction (h) If there be no such conduct, it is open to the party, though he may not sue to set aside the transaction within the period of limitation to plead undue influence as a defendant in a suit brought against him to enforce the transaction "A defendant in a suit is entitled to resist a claim made against him by pleading fraud [or undue influence] and he is entitled to urge that plea though he may not have himself brought a suit to set aside the transaction and is not, in circumstances like the present precluded from urging the plea by the [law of limitation]" (i) This statement was adopted in a Madras case where it was said "We do not think it follows that because a party's remedy as plaintiff to have an instrument avoided is time barred, his right to say by way of equitable defence, if sued that the instrument ought not to be enforced is equally time barred" (j) This is in entire accordance with the authorities familiar in English equity practice to which it is needless to make further reference

**Rights of legal representatives** —A sale deed obtained by an uncle from his niece by the exercise of undue influence, the uncle standing in a fiduciary relation to the niece, may be set aside, after the death of the niece, by her legal representative (k)

**17.—"Fraud"** means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract —

- (1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true,
- (2) the active concealment of a fact by one having knowledge or belief of the fact,

(g) *Lakshmi Doss v Iyer* L II (197) 30 Mad 169  
 (h) *Allicat v Saker* (1857) 10 Ch Div 115 at pp 181 182 186 Wright v Van derplank (1861) 8 D M & C 133 1141 F 60  
 (i) *Langhath v Iyer* v C I  
 Varasmi (1904) 23 B m (7) per Jenkins C J  
 (j) *Lakshmi Doss v Iyer* L II (197) 30 Mad 169  
 (k) *Chand v Saker* (1918) 2 F 111 111 Indu Trusts Act 188 s 88

- (3) a promise made without any intention of performing it ;
- (4) any other act fitted to deceive ;
- (5) any such act or omission as the law specially declares to be fraudulent.

*Explanation* — Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

#### *Illustrations*

- (a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.
- (b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.
- (c) B says to A — "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.
- (d) A and B being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

**Fraud in general.**—Fraud is committed wherever one man causes another to act on a false belief by a representation which he does not himself believe to be true. He need not have definite knowledge or belief that it is not true (1). When fraud produces damage it is generally a wrong entitling the person defrauded to bring a civil action. Under the Contract Act we are concerned with the effects of fraud only so far as consent to a contract is procured by it. We have already pointed out that the result of fraudulent practice may sometimes be a complete misunderstanding on the part of the person deceived as to the nature of the transaction undertaken, or the person of the other party. Such cases are exceptional. Where they occur, there is not a contract voidable on the ground of fraud, but the apparent agreement is wholly void for want of consent, and the party misled may treat it as a nullity even as against innocent third persons. But the fraudulent party is of course estopped from denying that there is a contract if the party deceived finds it to be to his interest to affirm

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(1) This is well settled in England. *Evans v. Edmonds* (1853) 13 C. B. 777, 93 R. R. 732.

the transaction, which is a conceivable though not probable case. In the same way the party deceived must be at liberty to treat the transaction as a voidable contract if he thinks fit. No doubt many transactions have in fact been so treated notwithstanding that under the law as settled in *Cundy v Lindsay* (n) they might have been declared wholly void.

**Sub-ss 3, 4, 5**—The language of the Act throws no light on the relation of fraud to misrepresentation. It might even be said to obscure it. That relation, however, may be very simply stated. Fraud, as a cause for the rescission of contracts, is generally reducible to fraudulent misrepresentation. Accordingly we say that misrepresentation is either fraudulent or not fraudulent. If fraudulent it is always a cause for rescinding a contract induced by it, if not, it is a cause of rescission only under certain conditions, which the definitions of s 18 are intended to express. There are, however, forms of fraud which do not at first sight appear to include any misrepresentation of fact, and sub ss 3, 4, and 5 are intended to cover these. With regard to a promise made without any intention of performing it (sub s 3), it may fairly be said that a promise, though it is not merely a representation of the promisor's intention to perform it, includes a representation to that effect. Some promises are given more readily and willingly than others, but we accept promises only because we believe them to be made in good faith, and no one would be content with a promise which he believed the promisor to have no intention of keeping. Similarly it is fraud to obtain property or the use of it under a contract by professing an intention to use it for some lawful purpose when the real intention is to use it for an unlawful purpose (n). Our modern authorities have removed the difficulty which used to be felt in treating the statement of a man's intention as a representation of fact. "There must be a misstatement of an existing fact but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." Accordingly it is fraud to obtain a loan of money by misrepresenting the purpose for which the money is

(n) Note (a) p 89 above

(n) See *Frost v Hill* (1841) 15 C B 407. 100 J B 218 which affirming

this decided that the defrauded party having given possession is not obliged to resume it by force with it price &c &c

wanted, even if there is nothing unlawful in the object for which the money is actually wanted and used (o) In particular, it is well settled in England that buying goods with the intention of not paying the price is a fraud which entitles the seller to rescind the contract (p) On the whole, then sub s 3 of the present section did not introduce any novelty (q)

The mention of 'any other act fitted to deceive' in sub s 1 appears to be inserted merely for the sake of abundant caution

**Acts and omissions specially declared to be fraudulent**—Sub s 5 applies to cases in which the disclosure of certain kinds of facts is expressly required by law, and non compliance with the law is expressly declared to be fraud Thus by s 55 of the Transfer of Property Act (IV of 1882) the seller of immovable property is required to disclose to the buyer "any material defect in the property of which the seller is and the buyer is not, aware, and which the buyer could not with ordinary care discover," and the buyer to disclose to the seller 'any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware and which materially increases the value of such interest," and 'omission to make such disclosures is fraudulent," and this, it seems even if the omission be due merely to oversight (r) In England a similar duty of disclosure exists, and failure to fulfil it is a misrepresentation creating a right to rescind the contract, but, if not shown to be wilful, the omission would not be called fraudulent Various dealings with property are made voidable as being fraudulent or declared to be fraudulent as against the transferor's creditors or assignees by other enactments But as these transfers of property cannot well be employed as inducements to any other party to enter into any contract beyond such agreement as is involved in the fraudulent transfer itself they do not come within the

(o) *Edgington v Fitzmaurice* (1885) 29 Ch Div 459 480 483 per Bowen L J

(p) *Clough v L & N W R Co* (1871) L R 7 Fx 21 in Ex Ch *Ex parte Witteraler* (1875) L R 10 Ch at p 449

(q) Borrowing money with no intention of repaying it is cheating under the Penal Code s 416 illustration (f)

(r) Note that an agreement between vendor and purchaser that the vendor is not to be liable for defective title will not excuse active concealment *Akhtar Jahan Begam v Harsari Lal* (1927) 20 All L J 708 103 I C 310 A I P 1927 All 693

- scope of the Contract Act, and we have no occasion to dwell upon them here (s)

**Mere non-disclosure**—There are special duties of disclosure (of which we have just seen an instance) in particular classes of contracts (t), but there is no general duty to disclose facts which are or might be equally within the means of knowledge of both parties. Silence as to such facts, as the Explanation to the present section lays down is not fraudulent. There is a well known American case on this point arising out of the conclusion of peace between Great Britain and the United States after the war commonly known as the war of 1812. The contract was for the sale of tobacco the buyer knew, but the seller did not, that peace had been made; and on the seller asking if there was any news affecting the market price, the buyer gave no answer. The Supreme Court of the United States held that there was nothing fraudulent in his silence (u). But there are at least two practical qualifications of this rule. First, the suppression of part of the known facts may make the statement of the rest, though literally true so far as it goes, as misleading as an actual falsehood. In such a case the statement is really false in substance, and the wilful suppression which makes it so is fraudulent (v). Secondly, a duty to disclose particular defects in goods sold, or the like, may be imposed by trade usage. In such a case omission to mention a defect of that kind is equivalent to express assertion that it does not exist (w). The illustrations will now be easily understood. We are not aware of any English authorities corresponding to (b) and (c).

## 18.—“Misrepresentation” means and includes—

- Misrepresentation defined
- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true,

(s) See Transfer of Property Act s 53 (transfers in fraud of other transferees or of creditors), Presidency Town Insolvency Act 1909 s 56. Provincial Insolvency Act 1907, s 37. *Manmohandas v Macleod* (1902) 26 Bom 763.

(t) *Per Contract of Fire Insurance Imperial Insurance Co v British Crown*

*Insurance Corporation* (1877) 41 Cal 581 21 I C 836. See also s 113 below.

(u) *Lafayette v Organ* (1817) 2 Wheat 178.

(v) *Peck v Gurney* (1873) 1 R G H 1 392 403.

(w) *Jones v Bollen* (1813) 1 Taunt 817, 14 R R 683.

- (2) any breach of duty which without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him,
- (3) causing however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement

**Language of the Section**—This is one of the sections taken wholly or in part from the draft Civil Code of New York and it is one of the least satisfactory in point of form. In sub s. 1 the use of the word ‘warranted’ in a sense (whatever that sense may precisely be) unknown to the law and in a subject matter where the words ‘warranty’ and ‘condition’ have already caused quite enough trouble is an elementary fault. Nor is the intention of the qualifying clause to which we shall return altogether clear. However the Contract Act has at least made some improvement on the classification of the New York draft where the original of this clause stands under the head of Fraud. Sub s. 2 is obscure and apparently useless. Sub s. 3 (which does not occur in the New York draft Code) seems to involve confusion between contracts voidable because consent was obtained by misrepresentation and transactions which can have no legal effect except possibly by way of estoppel because there was no real consent at all.

**Principles of English law as to misrepresentation**—The Common Law recognises a general duty not to make statements which are in fact untrue with the intent that a person to whom they are made shall act upon them to the damage of a person so acting and without any belief that they are true. The breach of this duty is the civil wrong known as fraud or deceit. But if belief is there it is not required by any general rule of law to be founded on any reasonable ground though want of any reasonable ground may be evidence of want of belief (x). Nor is there any universal duty to give correct information, except so far as a partial statement of the truth may be rendered

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(x) *Derry v. Peek* (1889) 14 App. Cas. 373. Such is the law settled for England by the House of Lords. It is by no means clear that the common law is generally so understood in other jurisdictions.

substantially false by omission of known facts (p 118, above), or to give any information at all. With regard to contracts, the general principle is that if one party has induced the other to enter into a contract by misrepresenting, though innocently, any material fact specially within his own knowledge, the party misled can void the contract. We do not know of any positive authority for extending such a rule, even in equity, to matters of fact equally within the means of knowledge of both parties. But reliance on the other party's statement in such matters is not common or easily proved, and it is certainly convenient to state the law in the broad form that "a false representation by one party in regard to a material fact made for the purpose of inducing the other party to enter into a contract and actually inducing the latter to enter into the contract, renders the contract voidable" (y). If this can be accepted as the rule of the modern Common Law, the Contract Act does not go beyond it if indeed it goes so far. The qualifying words of the Act will be considered below. In certain classes of contracts, where the facts are specially within one party's knowledge, a positive duty of disclosure is added and the contract is made voidable by mere passive failure to communicate a material fact. The principal examples of this special duty are to be found in the several branches of the contract of insurance and in sales of immovable property (cp p 117, above). But there is no positive duty of disclosure between contracting parties where the facts are not by their nature more accessible to one than to the other though one party may have acquired information which he knows that the other has not ( ).

In the same way parties are not bound to remove mistakes to which they have not contributed (a). It must be remembered that the

(y) *Harriman v 426*, cf *Anson 17th ed 181 seqq*. I cannot precisely agree with Sir W. Anson's historical view of the rules of equity in England but this is not material in India.

( ) *Lordship v Organ 2 Wheat 98* (p 118 above). "The question in this case is whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendor, ought to have been communicated by him to the vendor."

The Court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits when the means of intelligence are equally accessible to both parties. But at the same time each party must take care not to say or do anything tending to impose upon the other. per Marshall C. J. For a later example see *Turner v Green* [1895] 2 Ch 205.

(a) *Smith v Hughes* (1871) 1 B. & C. Q. B. 517.

parties can always decide beforehand for themselves if they choose, what facts shall be deemed material and to what extent. On the one hand they can make the existence of any specified state of facts or the truth of any affirmation an essential term or condition of the contract so that without it there is no contract at all (b) on the other hand they can make any fact or affirmation the subject matter of a warranty or collateral agreement so that failure to make it good shall not void the principal contract but only give a right to damages. This is exemplified by the ordinary warranties expressed or implied on a sale of specific chattels (c). In every case the question is what the parties really intended. Much perplexity would have been avoided if this principle explicitly recognised only in the second half of the nineteenth century (d) had been understood earlier.

**Sub-s 1**—What is meant by the positive assertion in a manner not warranted by the information of the person making it of that which is not true? Many persons would say that in any ordinary use of the English language the assertion of that which is not true though it may be innocent and even free from negligence cannot be warranted in any manner. Now the framers of the New York Civil Code put this clause under the head of Fraud. Probably what they meant was that a misrepresentation made with reasonable and probable cause for believing it true should in no case be treated as fraud but that a reckless or grossly negligent misrepresentation should be. The result would be to lay down a more stringent rule as to fraud than is sanctioned by English decisions in fact some such rule as the Court of Appeal laid down in England but the House of Lords refused to adopt in *Derry v Peel* (e). When this clause is transferred to the head of misrepresentation it would seem to mean that innocent misrepresentation does not give cause for avoiding a contract unless the representation is made without any reasonable ground. The High Court of Calcutta has held that an assertion cannot be said to be 'warranted' for the present purpose where it is based upon

(b) *Eden v Burness* (1863) 3 B & S 731 (slip described as charter party as now in the port of Amsterdam).  
*Lannerman v White* (1861) 10 C B N S 544 (lops bought on terms of being free from treatment with sulphur).

(c) See the sections on Warranty in the Sale of Goods Act of 1930.

(d) See note (b).

(e) 14 App Cas 33 reversing judgment of C A 37 Ch D v 541.

mere hearsay. Thus if A makes a positive statement to B that C would be a director of a company about to be formed, and B applies for shares on the faith of that statement, the statement would be a misrepresentation if A did not derive the information from C direct, but from a third party, D (f). In the course of the judgment Maclean C J said "I need scarcely say that we must deal with this case according to the law of India and not of England and if we find the term 'misrepresentation' defined by statute in this country we must do our best to ascertain whether the case is brought within that statutory definition. [A] says that [D] told him that he [D] had authority from [C] to use his name in the prospectus as a director in other words that he [A] obtained his information not from [C] direct, but only through [D]. I am not disposed to think that if [A] had relied on the second hand information he derived from [D] he was warranted' in making the positive assertion that [C] would be a director (g). This appears to require on the part of the person making the representation a belief not merely having some reasonable ground—for it is often quite reasonable to act upon second hand information even when it is not unavoidable—but founded on the best information that is available. There is no reason to be dissatisfied with this judgment, though it may be matter of historical doubt whether the framers of the Act intended to go so far. The qualification does not of course apply to the classes of contracts where there is a special duty to disclose all material facts within a party's knowledge. Outside these contracts of 'abundant good faith' the rule of the High Court of Calcutta sets up a standard of diligence which may well be thought adequate though it would not satisfy those learned writers in England and America who take the view that 'innocent misrepresentation which brings about a contract is now a ground for setting the contract aside (h) in all cases.

We may refer to a Punjab case to illustrate the meaning of the expression "positive assertion". A sells a mare to B. Before the sale A writes to B as follows in answer to inquiries from B. "I think your queries would be satisfactorily answered by a friend if

(f) *Moh n Lal v Sri Gungay Coll n*  
*Millr C* (1891) 4 C W N 361

(h) Anson 187 Harriman 111  
 11 above

(g) 4 C W N p 788

you have one in the statute and I shall feel more satisfied. All I can say is that the mare is thoroughly sound.' The letter is a 'positive assertion' of soundness coupled with a recommendation to B to satisfy himself before purchasing, but it does not amount to a warranty (i).

**Sub-s 2**—This subsection is, as already stated, obscure (j). It was considered in a Bombay case (k) by Sargent J. 'The second clause of s. 18 is probably intended to meet all those cases which are called in the Courts of Equity, perhaps unfortunately so, cases of 'constructive fraud' (l) in which there is no intention to deceive, but where the circumstances are such as to make the party who derives a benefit from the transaction equally answerable in effect as if he had been actuated by motives of fraud or deceit.' In that case the plaintiffs, who were creditors of the defendants, sued to set aside a composition deed executed by their agents alleging that their signature was obtained by a representation made by one of the defendants that the deed was nothing more than an assignment to trustees for the benefit of creditors as agreed to in a previous meeting of the creditors. It was further alleged that the deed contained a release of which no mention was made at the meeting and of which the plaintiffs' agents had no knowledge. Under those circumstances the High Court of Bombay declared the release absolutely void on the ground that the deed as it was signed was essentially different from that which the plaintiffs' agent intended to execute, or thought they were executing, when they affixed their signature to the deed. The Court went further and said that there was another ground on which the plaintiffs were entitled to relief, namely that there was a duty on the part of the defendants within the meaning of the present subsection to communicate to the plaintiffs' agents the fact of the existence of the release, and that the breach thereof entitled the plaintiffs to avoid the transaction under s. 19 of the Act. But it is submitted that the

(i) *Currie v Pennick* (1886) *Punj Rec* no 41.

(j) The framers of the New York draft Code seem to have extracted this rule from *Bulkeley v Wilford* (1834) 2 Cl & F 102 37 R R 39 which really proceeded on the much more intelligible principle that an agent who is bound to

be skilled shall not profit by his own incompetence.

(k) *Oriental Bank Corporation v Fleming* (1879) 3 Bom 249 267 see this case cited in the commentary on s. 13 at p. 86 *supra*.

(l) This term has been obsolete for many years in English practice.

first sub section was more applicable, as there was a 'positive assertion' by one of the defendants that the document was nothing more than a mere assignment of the creditors' property to trustees

**Sub-s 3**—This sub section was applied in a Bombay case (m) where it was held that though a company was not liable as drawer on a bill of exchange signed by two of the directors and the secretary treasurer, and agent of the company, yet it was liable to the bank to which the bill was sold as for money received by the company to the use of the bank. The decision proceeded on the ground that the directors while acting within the scope of their authority, had sold the bill as one on which the company was liable but upon which having regard to the form in which it was drawn, the company could not be rendered liable, and the directors were therefore, guilty of misrepresentation within the meaning of the present sub section. The case was no doubt within the terms of the Act, but it might have been decided on the broader ground that a buyer "is entitled to have an article answering the description of that which he bought," and that here the document which the bank had bought had not the force or value which it purported and was supposed to have. Thus it might be regarded as a case of common mistake under s 20 of the Act, entitling the party who had paid money to recover it under s 72. In *The Oceanic Steam Navigation Co v Soonderdas Dhurumsey* (n) the defendants in Bombay chartered a ship wholly unknown to them from the plaintiffs which was described in the charter party and was represented to them, as being not more than 2 800 tonnage register. It turned out that the registered tonnage was 3 015 tons. The defendants refused to accept the ship in fulfilment of the charter party and it was held that they were entitled to void the charter party by reason of the erroneous statement as to tonnage. It is difficult to see how the Court having regard to the terms of the Act and to the evidence of the usage of Bombay and the understanding of the parties in the particular case could have decided otherwise. But this case does not necessarily lay down any rule that an error in stating the amount of tonnage will in general render a charter party voidable. In England such a statement does not, in the absence of special circum-

(m) *In re Nursey Sinking and Steaming Co Ltd* (1880) 6 Bom D°

(n) (1890) 14 Bom 11

stances, amount even to a warranty (o) As further illustrating the rule laid down in the present sub section we might cite an earlier case, where it was held by the Allahabad Court that an agreement by the defendant to sell and deliver a boiler to the plaintiff at Rajghat was voidable at the option of the defendant, the plaintiff having represented (though innocently) to the defendant that there was a practicable road all the way, while, as a matter of fact, there was at one point a suspension bridge not capable of bearing the weight of the boiler (p)

**Misrepresentation of fact or law.**—It used to be said in English books that misrepresentation which renders a contract voidable must be of fact, but there does not seem to be really any dogmatic rule as to representations of law The question would seem on principle to be whether the assertion in question was a mere statement of opinion or a positive assurance—especially if it came from a person better qualified to know—that the law is so and so It seems probable in England, and there is no doubt here, that at any rate deliberate misrepresentation in matter of law is a cause for avoiding a contract Where a clause of re entry contained in a *kabuliyat* (counterpart of a lease) was represented by a zamindar's agent as a mere penalty clause, the Judicial Committee held that the misrepresentation was such as vitiated the contract, and the zamindar's suit was dismissed (q)

**19.**—When consent to an agreement is caused by coercion (r), fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that

(o) *Birker v Hindle* (1856) 6 I & B 675, 106 R R 762

(p) *Johnson v Crowe* (1874) 6 N W P 350 In fact the agreement was made several months before the Contract Act came into operation but the case was treated at every stage as if it fell within the Act The same result might have been arrived at on the ground that the existence of a practicable road all the

way was an essential term or condition of the contract Cp Pollock *Law of Fraud in British India* p 101

(q) *Pertip Chunler v Mohenlanath Parkhat* (1889) 17 Cal 291 I R 16 I A 233

(r) In s 19 the words undue influence have here been omitted, being repealed by the Indian Contract Act Amendment Act VI of 1899 s 3

the contract shall be performed (s), and that he shall be put in the position in which he would have been if the representations made had been true.

*Exception.*—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence (ss).

*Explanation.*—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

#### Illustrations

(a) A, intending to deceive B, falsely represents that 500 mounds of indigo are made annually at A's factory and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that 500 mounds of indigo are made annually at A's factory. B examines the accounts of the factory, which shows that only 400 mounds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract or may insist on its being carried out, and the mortgage debt redeemed (t).

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B. B dies. C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

**Scope of the section.**—The section states the legal effect of coercion, fraud, and misrepresentation, in rendering contracts procured by

(\*) The same contract, he cannot set up a different one in the same suit. *Mahmal v. Ramappa* (1929) 119 I. C. 681, A. I. R. 1929 Nag. 254 (a mortgage case, connection with general contract law remote).

(\*\*) This question is rather frequent in disputes arising from a defect of title in the sale of immovable property, e.g.

*Harilal Dalsukhlram v. Mulchand* (1928) 52 Bom. S.S. 113, 114, 27 A. I. R. 1928 Bom. 427.

(f) Under the Transfer of Property Act IV of 1882, s. 55 (k) the seller, not having sold subject to an encumbrance, is bound to discharge the encumbrance independently of any question of fraud.

them voidable (u), the foregoing sections have only laid down their respective definitions. Perhaps the most important parts of the section, certainly those which need the most careful attention, are the exception and the explanation. These mark, though hardly with practical completeness, the limits within which the rule is applied. Before considering them we have to pause on the second paragraph of the body of the section. It reads plainly enough at first sight, but the thought does not seem to be really clear. The party entitled to set aside a voidable contract may affirm it if he thinks fit. That is involved in the conception of a contract being voidable. And if he affirms it he may require the performance of the whole and every part of it (subject to the performance in due order of whatever may have to be performed on his own part) or, in default thereof, damages for non performance (subject to special causes of excuse, if any, which we are not now considering). If, as may well be the case, the default is wholly or partly due to the non existence of facts which the defaulting party represented as existing this party can obviously not set up the untruth of his own statement by way of defence or mitigation, and, if the case is a proper one for specific performance, and if it is in his power to perform the contract fully, though with much greater cost and trouble than if his statement had been originally true, he will have to perform it accordingly (v). Is anything more than this meant by the declaration of the affirming party's right to "be put in the position in which he would have been if the representations made had been true"? (w). There are obviously many cases in which such

(1) Fraud in the performance of a contract is no ground for rescission. *Jamsetji v Hyji* (1913) 17 Bom L R 158 169. *Fa al v Mangaldas* (1921) 46 Bom 489, 508. 66 I C 726. The principle is obvious. When a man is once bound to perform an enforceable promise any further inducement or encouragement to do so is gratuitous and immaterial and he cannot complain if any expectation raised in this manner is disappointed. On the other side a promisor either performs his promise or not. If not the breach of contract is the same whether his conduct has been honest or fraudulent (though fraud may have other consequences outside the contract in criminal or tort

rupture jurisdiction). It must be remembered that an act done as the consideration for an offered promise is not the performance of a contract for there is no contract until it is done and the foregoing observation does not apply to it.

(v) See the Specific Relief Act s 18 below. *Quære* whether this clause can usefully be applied as a measure of money compensation see *Sorabshah Pestinji v Secy of State* (1927) 109 I C 141 29 Bom L R 153. A I R 1928 Bom 17 but this seems a simple case of the party having lost his claim if any to rescind the contract by delay.

(w) The Indian Law Commissioners draft was curiously worded (16). A

restitution is not literally possible. Thus, if the owner of an estate subject to a lease for an unexpired term contracts to sell it to a purchaser who requires immediate possession, and conceals the existence of the lease (x), the purchaser cannot be put in the same position as if the representation that there was no tenancy, or only such a tenancy as could be determined at will, had been true. Cases may occur, on the other hand, where a seller of land has held out, though not in express terms or wilfully, an element of attractiveness or security in the property offered for sale which it is in his power to realise by some act or undertaking on or with regard to adjoining property of his own. In such a case there is English authority for saying that he can enforce the contract only on the terms of making good what he has represented (y). But it is dangerous to formulate general propositions in the law of contract from decisions in suits for the specific performance of contracts relating to land, and it is not clear that the facts of the decision in question are not reducible to misrepresentation or an ambiguous offer. Nor is it certain that the present enactment can always be literally relied on. A sells a house to B and by some blunder of A's agent the annual value is represented as being Rs. 2,000 when it is in truth only Rs. 1,000. According to the letter of the present paragraph, B may insist on completing the contract and on having the difference between the actual and the stated value paid to him and his successors in title by A and A's successors in title for all time. Nothing short of that will put him "in the position in which he would have been if the representations made had been true." This is obviously not the intention of the enactment.

There is an important class of cases in which although there is no such misrepresentation as to make the contract voidable, complete performance is, by reason of misdescription or otherwise unattainable,

person who, either knowingly, or innocently, makes a false representation whereby he induces another to enter into a contract with him is bound to place the other in the same position as if the representation had been true, and in default of his doing so the contract is voidable at the option of the person who has been misled. This, literally read, says that the contract is voidable only if

the representation besides having been untrue when made, cannot be subsequently made good. Such a restriction of the misled party's rights we believe unknown to the law.

(x) *Morgan v. Government of Hyderabad* (1888) 11 M.L.J. 419.

(y) *Bird v. Eschworth* (1804) 1 P. & F. 100. See further para. 18 of *Specif. Relief Act* below.

and specific performance will be decreed subject to compensation for the defect. It was originally proposed to deal with such cases in the Contract Act. The enactment governing them is now to be found in the Specific Relief Act, s 11, see the comments thereon below.

**Suit by representatives**—The option of avoiding a contract procured in any of the ways mentioned in ss 19, 19A, is exercisable by the party's representatives unless at the date of his death he had lost it by acquiescence or otherwise. It is rather surprising that the High Court of Bombay has been called upon to reject an apparently serious argument to the contrary (z).

**Exception : Means of discovering truth**—The exception is wider—we must suppose deliberately so—than the corresponding English authorities. In England the principle is that if a man makes a positive statement to another, intending it to be relied on, he must not complain that the other need not have relied upon it. "The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe" (a). The test is not whether the party might have inquired for himself but whether he did inquire and trust his own inquiries rather than the representation (b), and so far is this doctrine from being confined to cases of actual fraud that there is no decisive or recent authority for not applying it even to cases where the misrepresentation consists only in failing to disclose some fact which ought to be disclosed. No doubt there may be a question whether the party alleged to have misrepresented a fact really said, "I tell you it is so," or only "I think you will find it so." This question will according to the circumstances, be of the construction of particular words, or of the inferences to be drawn from words and conduct. Again, the possession of obvious means of knowledge may lead, in some cases, to a fair inference that those means were used and relied on. But still the real point to be considered is whether the party misled did put his trust in the representation made to him of which he complains, or in other information of his own. In the latter case the misrepresentation did not really cause his consent. In other words, the

(z) *Shravan Goda v Kashiram Deji* (1926) 51 Bom 133, 100 I C 932. The head note has the effect of suggesting quite wrongly, that the Court had some doubt on this point: it did, for abundant caution, add other reasons. And see

p 114, above

(a) *Dyer v Hargrave* (1805) 10 Ves 505, 510 8 R R at p 39

(b) *Redgrave v Hurd* (1881) 20 Ch Div 1

present Exception, so far as allowed by English law, is logically nothing but a branch of the following Explanation. However, the words of the Exception are perfectly clear. If, as seems not altogether improbable (c), they were not intended to alter the English rule, they were chosen with singular infelicity. It will be observed that the Exception does not apply to cases of active fraud as distinguished from misrepresentation which is not fraudulent (d). A vendor of a house and land knew that the purchaser wanted immediate possession and, while admitting that the property was occupied by a tenant, first concealed the fact that the tenant had a lease, and then pretended that the lease was forfeited, the purchaser was entitled to rescind the contract although he might have ascertained by independent inquiry what the tenant's interest really was (e).

The ordinary diligence of which the Exception speaks may be taken to be such diligence as a prudent man would consider appropriate to the matter, having regard to the importance of the transaction in itself and of the representation in question as affecting its results. A possibility of discovering the truth by inquiries involving trouble or expense out of proportion to the value of the whole subject matter would not, it is conceived, be means of discovering the truth with ordinary diligence. In *Re Aursey Spinning and Weaving Co* (f), cited at p. 124, *ante*, it was contended on behalf of the company that the exception to s. 19 was applicable to that case, and that the bank could have discovered with ordinary diligence that the company was not liable on a bill drawn by its secretary, treasurer and agent. Sargent J. said: "No ordinary diligence would have enabled the bank to discover that the company was not liable on this bill. The form of the bill would naturally lead the bank, as it admittedly did lead the bank, to suppose that it was the company's bill as represented and the discovery could only be made by persons trained in the law and after a

(c) At least the realising out of conditions of sale in English does not constitute means of discovering the truth for a buyer who does not understand English and such a buyer at a sale under the direction of the Court is entitled to rely on statements made by the auctioneer in the presence and hearing of the clerk in charge. *Mahomed Kala Mea v. Harperink* (1908) 36 Cal 323, 111

361 V 3. See also *Stonington v. Bank* (1910) 30 Bom 22 at p. 31.

(d) See *Abdulla Khan v. Girdhari Lal* (1901) 11 Ind Jec no. 43.

(e) *Morgan v. Government of Ha Dara* (1888) 11 M.L. 419-420. See also *Jogendra Nath v. Chandra Kumar* (1915) 42 Cal 28 at p. 31. 21 I.C. 193.

(f) (1880) 5 Bom 65.

careful examination of legal authorities " But where a purchaser of rice stored up at a place to which he had an easy access refused to take delivery on the ground that the rice was of an inferior quality to that contracted for, it was held that he could not rescind the contract, for he could have discovered the inferiority of the quality by using " ordinary diligence " (g)

**Explanation :** as to "causing consent."—The principle of the caution given here is obvious. A false representation, whether fraudulent or innocent, is merely irrelevant if it has not induced the party to whom it was made to act upon it by entering into a contract or otherwise. He cannot complain of having been misled by a statement which did not lead him at all. In the common phrase of English text-books, the representation must be definable as *dans locum contractus*, bringing about the contract. Hence an attempt to deceive which has not in fact deceived the party can have no legal effect on the contract, not because it is not wrong in the eye of the law, but because there is no damage. This rule is applicable where a seller of specific goods purposely conceals a fault by some contrivance, in order that the buyer may not discover it if he inspects the goods, but the buyer does not in fact make any inspection (h). "Deceit which does not affect conduct cannot create liabilities" (i). In particular cases it may be hard to determine whether a certain representation was in fact relied upon so that it can be said to have caused consent to the contract. This question, where it arises, is a question not of law, but of fact (j), on which the character of the statement made and the probability that it would influence a reasonable man's determination may be taken into account. "If it is proved that the defendants with a view to induce the plaintiff (k) to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by

(g) *Shoshi Mohun Pal v Nolo Kristo* (1878) 4 Cal 801

(h) *Horsfall v Thomas* (1862) 1 H & C 90, 130 R R 394

(i) Anson p 207, 17th ed

(j) *Currie v Pennick* (1856) Punj Rec no 41

(k) Of course the positions of the party

having made the statement and the party to whom it was made, as plaintiff and defendant, will depend on the form in which each case comes before the Court. The suit may be to enforce or to rescind the contract, or (as in the case now cited) to recover damages for the wrong of deceit

12a. the statement      Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act " (l) There is no rule of law that any particular kind of statement is necessarily material in some cases and immaterial in others. In general one man's money is as good as another's, and in a contract of loan the lender's personality is indifferent to the borrower, but where a money lender who has acquired an evil repute for hard dealing in his own name advertises and lends money in assumed names, it is a permissible inference of fact that the concealment of his identity was a fraud inducing the borrower to contract with him (m). The fact that a person has taken pains to falsify or conceal a fact is cogent evidence that to him at any rate that fact appeared material, and the falsification or concealment an important condition of obtaining the other party's consent. A man who has so acted cannot afterwards turn round and say, "It could have made no difference if you had known the truth."

**Illustrations.**—There is nothing calling for particular comment in the illustrations to this section, except that the case put in illustration (c) would now be more simply disposed of under the specific provisions of the Transfer of Property Act, see the note on it above.

**Rescission of voidable contracts**—As to the consequences of the rescission of voidable contracts, see s. 61.

**Specific Performance**—As to the effect of fraud and misrepresentation on the rights of a party to claim or resist specific performance, see Specific Relief Act I of 1877, ss. 26 (a), (b), (c), 28 (b), 31, and 35 (a).

**Right of third party cannot be set up.**—It is no defence to an apparently regular claim to property to suggest, without showing any title of one's own, that the original transaction from which the claimant's title is derived may have been voidable under this or the following section (n).

**19a.**—When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Power to set aside contract induced by undue influence

(l) *Smith v Chadwick* (1884) 9 App Cas 167, 196 (Lord Blackburn)

(m) *Gordon v Street* [1899] 2 Q B 611 C A

(n) *Trimbal Bhikaji v Shankar Shamrar* (1911) 36 Bom 37. This would be too elementary to call for decision or report in England.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court (o) may seem just.

*Illustrations*

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.

This section, inserted by Act VI of 1899, s. 3, appears to be intended to give express sanction to the constant practice of Indian as well as English Courts in cases of unconscionable money lending, namely, to relieve the borrower against the oppressive terms of his contract, but subject to the repayment to the lender of the money actually advanced with reasonable interest (p). (See the illustrations.) The rate of interest allowed by the High Courts as reasonable has varied, according to circumstances, from 6 and 12 per cent in Bengal to 24 per cent in Bombay and the North-West Provinces (q). See notes to s. 16, "unconscionable bargains," p. 108, above.

The second paragraph is the only portion of the section that is new. However, as it stands it is virtually a reproduction of ss. 35 and 38 of the Specific Relief Act. The combined effect of those two sections is that a contract in writing may be rescinded at the suit of a party when (amongst other causes) it is voidable, but that the Court may require the party rescinding to make any compensation to the

(o) The refusal of terms suggested by the Court leaves this discretion free. *Sundar Rai v. Suraj Bai*; *Rai* (1925) 47 All 932, 88 I C 1013.

(p) Cited with approval in *Poma Dongra v. William Gillespie* (1907) 31 Bom 348, at p. 352.

(q) *Mothoormohun Roy v. Soorendro Narain Deb* (1875) 1 Cal 108, *MacIntosh v. Hunt* (1877) 2 Cal 202, *Chunni Kuar v. Rup Singh* (1888) 11 All 57, affirmed in appeal *sub nom. Raja Mohkam Singh v. Raja Rup Singh* (1893)

15 All 352, L R 20 I A 127 (where 20 per cent was allowed), *Dhanipal Das v. Maneshar Bakhsh Singh* (1906) 28 All 570, L R 33 I A 118, *Maneshar Bakhsh Singh v. Shadi Lal* (1909) 31 All 386, L R 36 I A 96 (where 18 per cent was allowed), *Balkishan Das v. Madan Lal* (1907) 29 All 303 (where 24 per cent was allowed), *Poma Dongra v. William Gillespie* (1907) 31 Bom 348 (where 24 per cent was allowed), *Rannee Annapurni v. Swaminatha* (1910) 34 Mad 7 (where 24 per cent was allowed).

united will from forming a contract, any more than from making the terms of the contract, when thus concluded, [from being] (v) binding in spite of any future change of circumstances" (w) As observed by the Judicial Committee in *Peria Sami v Representatives of Salugar*, "the grant, whatever its effect, was not necessarily avoided because subsequent events disappointed the expectation in which it was made" (x) But where a settlement was entered into between Government and certain *inamdars* in respect of a village whereby the latter agreed to pay a certain yearly quit rent, and both parties believed that the *inamdars* were the superior holders of all the lands in the village, it was held that the settlement was void as regards a portion of the lands which subsequently turned out to be *wanta* lands held by certain *grassias* as owners in possession (y) Where a property agreed to be sold had been notified for acquisition under the Calcutta Improvement Act, and neither the vendor nor the purchaser was aware of the notification at the date of their agreement, the notification was held to constitute a matter of fact essential to the agreement within the meaning of this section and the agreement was declared void (z) Upon the same principles a compromise of a suit will be set aside if it was brought about under a mistake as to the subject matter of the agreement (a) The view thus expressed is confirmed by later English cases Not only a compromise (b) but an order of the Court made by consent (c) may be set aside if the arrangement was entered into even under a one sided mistake of counsel to which the other party, however innocently contributed, or even otherwise if the mistake was such as to prevent any real agreement from being formed *A fortiori* it is so in the case of the mistake being common to both parties (d) The existence of a separate warranty in a contract of sale is evidence that the matter of the warranty is not an "essential" part of the contract In such case if there

(v) Sic. these words are evidently inserted by a clerical error

(w) *Ibid* p 158

(x) (1878) L. R. 6 I A 61, at p 73

(y) *Secretary of State for India v Sheth Jeshing'has* (1892) 17 Bom 407

(z) *Narsing Dass Kothari v Chulloo Lall Master* (1903) 60 Cal 615, 74 I C 996

(a) *Bibee Solomon v Abdool Azeez* (1891) 6 Cal 687, 700 But a com

promise on a dispute of title is not affected by a later decision upon that title  
*Secy of State v Aala Bihash* (1927) 100 I C 730, A I R 1927 Oudh 198 (estoppel perhaps the better reason)

(b) *Hickman v Herens* (1891) 2 Ch 639

(c) *Widding v Sanderson* (1897) 2 Ch 531

(d) *Huddersfield Banking Co v H Lister & Son* (1893) 2 Ch 273

is a breach of the warranty, the purchaser is only entitled to compensation for the breach, and the sale is not even voidable. It is still a stronger case where not only no warranty is given by the vendor, but the purchaser buys "subject to all defects." Thus, where a mortgagee sold his claim under the mortgage subject in effect to all defects, and it was subsequently discovered that the mortgage was inoperative, as it was attested by only one witness, it was held that, though both parties were ignorant of that fact at the time of the assignment, the purchaser was not entitled to rescind the contract and claims back the purchase money, the purchase having been made subject to all defects (e). An administration bond given under s 256 of the Indian Succession Act, 1865 (now s 291 of Act XXXIX of 1925) is not void under this section, though the party to whom the grant of letters of administration is made may have obtained the grant by fraud upon the Court, and though neither the sureties nor the Court to which the bond is passed were aware of the fraud when the grant was made. In a modern case letters of administration of the estate of a deceased person were granted to A on execution of a bond by him and two sureties engaging for the due administration of the estate. It was subsequently discovered that A was not entitled to the grant, and that he had obtained it by false and fraudulent representations made in his petition for letters of administration. The grant to A was thereupon revoked, and a suit was brought against the sureties to recover from them the amount misappropriated by A and forming part of the estate. One of the defences raised on behalf of the sureties was that the bond was void under the present section and that they were not therefore liable upon the bond. It was contended that both the Court and the sureties were under a mistake as to a matter of fact "essential" to the agreement, namely, that A was entitled to letters of administration, and that the sureties would not have executed the bond but for that mistake. But a majority of the High Court of Calcutta held that the mistake of the Court and of the sureties did not relate to the *essential* subject of the contract. The decision was also based on the ground that the liability of sureties under an administration bond did not depend on the validity or invalidity of the grant (f). This decision was upheld on appeal to the

(e) *Sada Kaur v Tadjepally* (1907) 30 Mad 254. of *Bengal* (1906) 33 Cal 713 see particularly pp "37—40—46—47", "51 and "55.

(f) *Delendra Nath Dutt v Adm Gen*

King in Council (g) The same principle has been held to apply to surety bonds under the Guardians and Wards Act VIII of 1890 Thus, where A was appointed guardian of the property of a minor on passing a bond to the District Court executed by him and B as surety for the due management and realisation of the minor's property, and failed to account for the income of certain property which actually belonged to the minor, but was not included in the list of properties belonging to the minor annexed to the petition for his appointment, it was held that B was liable to make good the amount, though it might be said that both the Court and B were led to believe by A that the property did not belong to the minor (h) See also the commentary on s 13, above

In a Bombay case (i), A, fraudulently representing himself to be B, purported to mortgage to C property belonging to B C then transferred the pretended mortgage to D D insisted that the mortgagor should be a party to the deed of transfer A, still personating B joined in executing that deed as a concurring party The deeds of mortgage and transfer contained the usual covenants (j) D subsequently discovered that the mortgage and transfer deeds were not executed by B, but by A personating him, and he sued C for return of the transfer money The Court of first instance held that D was not entitled to a return of the transfer money, but, on appeal, the case was held to be one of a mistake of fact under this section so that C was bound under s 65 to repay the transfer money to D The correctness of the reversal seems doubtful On principle D was not entitled to recover as on a total failure of consideration for although the assignment passed nothing as a conveyance, it gave D a title to the debt (for which the property was only a security) as against A, who was clearly estopped from denying his identity with B for this purpose, and likewise, by estoppel, a right of action against him on the mortgagor's covenant for title express or implied Moreover D, having required the supposed B's concurrence had not relied on any assurance of C's as to the reality of the mortgage made in the name of B The fact (as presumably it was) that A was missing or insolvent or

(g) S C (1908) 35 Cal 255, 1 P 35 I A 109

(h) *Sarat Chandra Poy v Poyon Mohan Jee* (1908) 12 C W N 481

(i) *Jemal Alharathia v Dattatraya* (1916) 40 Bom 638 31 I C 715

(j) The report is not clear as to this The judgments as reported are not satisfactory *Clare v Lamb* (1875) 1 P 10 C P 331 is in favour of the decision below and the opinion expressed in the text but might be distinguished

## MISTAKE OF FACT

both does not affect the legal result. Then as to the Indian Acts it is obvious that there was no contract formed between C and D, but D paid C not under the agreement, but as consideration for an assignment made in pursuance of it, and therefore it does not appear that s 65 of the present Act applies to this case. neither does anything in the Transfer of Property Act seem applicable.

**Specific Performance** — As to the right of a party to resist specific performance of a contract on the ground of mistake see Specific Relief Act s 26 (a) and (b) and s 28 (a) below.

**Rectification** — The Courts will not rectify an instrument on the ground of mistake unless it is shown that there was an actual concluded contract antecedent to the instrument sought to be rectified and that the contract is inaccurately represented in the instrument. Thus in a Bombay case (1) the plaintiffs chartered a steamer from the defendants to sail from Jeddah on "the 10th August 1892 (fifteen days after the *Haj*)," in order to convey pilgrims returning to Bombay. The plaintiffs believed that "the 10th August 1892, corresponded with the fifteenth day after the *Haj*, but the defendants had no belief on the subject, and contracted only with respect to the English date. The 19th July 1892 and not the 10th August 1892, in fact corresponded with the fifteenth day after the *Haj*. On finding out the mistake the plaintiffs sued the defendants for rectification of the charter party. It was held that the agreement was one for the 10th August 1892, that the mistake was not mutual but on the plaintiffs part only, and, therefore that there could be no rectification. The Court further expressed its opinion that even if both the parties were under the mistake the Court would not rectify but only cancel the instrument, as the agreement was one for the 10th August 1892, and that date was a matter materially inducing the agreement. See also Specific Relief Act, Ch III, below and the undermentioned case (1).

**Compensation** — Note, in connection with the present section, the provision of s 65 that when an agreement is discovered to be void any person who has received any advantage under the agreement is bound

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(1) *Haji Abdul Rahman Allarakhia v The Bombay and Persia Steam Navigation Co* (1892) 16 Bom 561 followed *U Shier Thaung v U Kyam Dun* 125 I C 259

A I R 1930 Rang 12

(1) *Madhavi v Ramnath* (1906) 30 Bom 457

to restore it, or to make compensation for it, to the person from whom he received it. It is or should be elementary learning that a deficiency in quantity of land (or anything) sold which can be adequately dealt with by compensation does not come within this section at all (m)

21.—A contract is not voidable because it was caused by a mistake as to any law in force in British India, but a mistake as to a law not in force in British India has the same effect as a mistake of fact

*Illustration*

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of limitation. The contract is not voidable (n)

The general language of this section represents with approximate fidelity the current doctrine of text books down to the time when the Act was framed, namely, that relief is not given against mistake of law. However, modern authority has shown that the doctrine in question is not acceptable without rather large qualifications which, it is apprehended, Indian practitioners cannot safely neglect. Certainly mistake of law does not universally or generally invalidate transactions in which it occurs, but neither does mistake of fact. A man cannot go back upon what he has deliberately done—not to speak of excusing himself from liability for a wrongful act or offence—merely because he alleges that he acted under a misapprehension of the law. It is a citizen's business to know, by taking professional advice or otherwise, so much law as concerns him for the matters he is transacting. No other general rule is possible, as has often been observed, without offering enormous temptations to fraud. Nevertheless in England, at any rate, "it is not accurate to say that relief can never be given in respect of a mistake of law" (o), for where the mistake is so fundamental as

(m) *U Pan v Maung Po Tu* (1927) 100 I C 327, 5 Bur L J 206

(n) There was a second illustration to this section. A and B make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France. The contract is voidable. In this illustration voidable was an obvious slip for void which is required

both by legal principle and by the express terms of s 20. If there is really a common mistake on an essential matter of fact there is no contract at all, so the illustration was at best out of place. It was struck out by the repealing and amending Act (XXXV) of 1917.

(o) *Allcard v Waller* [1896] 2 Ch 369 391 per Stirling J

to prevent any real agreement "upon the same thing in the same sense" (s 13, p 81, above) from being formed, it is immaterial of what kind the mistake was, or how brought about. And in India it does not seem that the present section was intended to give validity to any apparent agreement not satisfying the conditions of real consent as laid down in ss 10 and 13. Moreover, it is to be observed that the existence of particular private rights is matter of fact, though depending on rules of law, and for most civil purposes ignorance of civil rights—a man's ignorance that he is heir to such and such property, for instance—is ignorance of fact. A man's promise to buy that which, unknown to him, already belongs to him is not to be made binding by calling his error as to the ownership a mistake of law (p). There seems to be nothing to prevent the Indian Courts from following English authority in cases of this kind, as in fact the Calcutta High Court has done (q). A agreed to take a lease from B of certain lands including mineral rights for coal mining operations. It was provided that B should make out a good title to the property. The lease was held by B on a tenure which was believed by both A and B at the date of agreement to carry with it mineral rights. A made several payments in advance to B, but later when a decision of the Judicial Committee and a decision of the Calcutta High Court threw very grave doubts upon this understanding of the law, A refused to carry out the agreement, and sued B for refund of advances. It was held following the principle of *Cooper v Phibbs* (r) that the case was one of a common mistake as to a matter of fact, and that the agreement was void under s 20, and A was entitled to a refund of the advances made by him. (See s 65, below.)

Again the section does not say that misrepresentation, at any rate wilful misrepresentation, of matter of law, may not be ground for avoiding a contract under s 17 or s 18.

As to the second clause of the section, British Indian jurisprudence has adopted the rule of the Common Law that foreign law is a matter of fact, and must be proved or admitted as such, though the strictness

(p) See *Cooper v Phibbs* (1867) L R 2 H L 149, 170.

(q) *Ram Chandra v Ganesh Chandra* (1917) 21 C W N 404, 39 I C 78. See *Apparao Chettiar v S.J.J. Co* (1925) 114 I C 338, A I R 1929

Mad 177, principle fully acknowledged, but the mistake of paying a surcharge for railway carriage not really authorised by the regulations was held to be a pure mistake of general law.

(r) See f n (p) above.

of the rule has been somewhat relaxed by the Evidence Act (s) Accordingly the statement or finding of any foreign law on which the Court proceeds in a given case is no more binding on the Court in any future case, even apart from the possibility of alteration in the law in question, than any other determination or assumption as to matters of fact

The cases in which the present section has actually been applied have been fairly simple Thus where a mortgage bond provided that if the mortgagor failed to redeem the mortgaged property within eight years the mortgagee should be the owner of the property, and the mortgagor, being unable to redeem, executed an absolute transfer of the property to the mortgagee, and put him in possession, it was held that a purchaser from the mortgagor of the equity of redemption subsequent to the date of the transfer was not entitled to redeem, even though the mortgagor might have been ignorant of his right to redeem the mortgage notwithstanding the clause in the mortgage precluding him from doing so (t) Here there was a complete conveyance and transfer of possession from the mortgagor to the mortgagee But if the matter had rested in contract only, and there was no transfer of the mortgaged property, the mortgagor would have been entitled to redeem the mortgage, on the principle "Once a mortgage, always a mortgage" There would have been no consideration for a promise to transfer the property to the mortgagee, and the question whether there was any mistake, and, if so, whether of fact or law, would really have been superfluous

An erroneous belief that a widow forfeits by her remarriage the rights of an occupancy tenant under the N-W P Tenancy Act, to which she has succeeded on the death of her first husband as his heir is a mistake of law, and a contract grounded on such belief is not voidable though the mistake may be common to both the parties to the contract (u) Similarly, an erroneous belief that a judgment debtor is

(s) Indian Evidence Act, s 23  
 "When the Court has to form an opinion as to a law of any country any statement of such law contained in a book purporting to be printed or published under the Authority of the Government of such country and to contain any such law and any report of a ruling of the Courts

of such country contained in a book purporting to be a report of such rulings is relevant

(t) *Lishnu Sakharan v Kashinath* (1886) 11 Bom 174

(u) *Sabhan Bibi v Malho Lal* (1907) All W N 197

bound by law, to pay interest on the decretal amount though no interest has been awarded by the decree as a mistake of law, and a contract grounded on such belief is not void. Such a belief is not a belief as to a matter of fact essential to the agreement within the meaning of s 20. The Judicial Committee so held in *Seth Gokul Dass v. Murli* (v). This is difficult to reconcile with a decision of the Bombay High Court that a contract founded upon the erroneous belief that a judgment-debtor is bound by law to pay interest on the decretal amount, though no interest has been awarded by the decree was void under s 20, as being a contract entered into under a mistake as to a matter of fact essential to the agreement (w). It was said in that case that such a mistake was "a mistake as to the private rights of the parties and as such a mistake of fact." That such a mistake is not a mistake of fact, but one of law, is abundantly clear from *Seth Gokul Dass's* case, where their Lordships said: "There was no doubt, a mistake of law on the part of the defendants in supposing that execution could be sued for interest upon the amount decreed from the date of the decree to the date of realisation, no such interest having been awarded by the decree. But that mistake appears to have been common not only to the plaintiff and the defendants, but also to the [Court which made the order of attachment]" (x).

22.—A contract is not voidable merely because it was caused by one of the parties to it being

Contract caused by  
mistake of one party  
as to matter of fact

under a mistake as to a matter of fact

At this day this section may seem open to the remark that it contradicts a proposition which no competent lawyer would think of asserting. But when the Act was framed it was not obviously superfluous, for strange things had been said within the foregoing ten years or thereabouts by one or two of the Judges of the Court of Chancery and lawyers practising in the Courts as they then were of Common Law were not expected to have any knowledge of equity and regarded the doctrines laid down in the name of equity by Vice Chancellors as mysteries which did not concern them.

(v) (1878) 3 Cal 602 L R 5 L R 417

I A 78

(x) (1878) 3 Cal 607 at p 608

(w) *Narayan v. Raoji* (1904) 6 Bom L R 5 I A 78

23.

As an illustration of the rule, *Haji Abdul Rahman Allarakhia v. The Bombay and Persia Steam Navigation Co (y)*, cited in the commentary on s 20, p. 139, above may be referred to

23.—The consideration or object of an agreement is

What considerations and objects are lawful and what not

lawful, unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

#### Illustrations

(a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.

## UNLAWFUL OBJECT OR CONSIDERATION.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction in effect a purchase by the defaulter, and would so defeat the object of the law (-).

(j) A who is B's mukhtar promises to exercise his influence as such with B in favour of C, and C promises to pay 1 000 rupees to A. The agreement is void because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void because it is immoral though the letting may not be punishable under the Indian Penal Code.

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**Unlawful Objects**—By s 10 an agreement is a contract (i.e. enforceable) only if it is made for a lawful consideration and with a lawful object. The present section declares what kinds of consideration and object are not lawful. Its phraseology is not happy (a). Properly we speak of the consideration for a promise, not the consideration of an agreement. If I agree to sell you a piece of land for Rs 20,000, my promise to convey the land is the consideration for your promise to pay the price, and your promise to pay the price is the consideration for my promise to convey the land. There is nothing that can be called the consideration of the agreement between us as a whole. If we read "promise" for "agreement," the text becomes clearer, and s 2 (e) (pp 13, 32, 33, above) though that sub section is itself not as clear as might be desired, appears to warrant us in doing this. See also illustration (a) to the present section.

The word "object" in this section was not used in the same sense as "consideration," but was used as distinguished from "consideration," and meant "purpose" or "design." It was so observed in a case where A had agreed to sell goods to B, and B while in insolvent circumstances assigned the benefit of the contract to his brother in law C for a *consideration* of Rs 100, the *object* both of B and C being to defraud B's creditors. It was said that the consideration for the assignment, namely, the sum of Rs 100, was lawful, but the object

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(2) See *Mohan Lal v Uday Narayan* (1910) 14 C W N 1031, 7 I C 2, which is a parallel case.

(a) The illustrations correspond very

nearly to those framed by the Law Commissioners in the first draft, cl 10. The text is quite different.

was unlawful, as it was to defeat the provisions of the Insolvency Act (b)

With regard to a consideration being forbidden by law, it is to be observed that, where the consideration is a promise, it may be forbidden in one of two distinct senses. The promise may be of something which it would be unlawful to perform, and here it is perhaps simpler to say that the object of the agreement, namely, the unlawful performance, is forbidden. Sometimes, on the other hand, although there is nothing unlawful in performing the promise, a positive rule of law, founded on reasons of general expediency, will not suffer any legal obligation to arise from a promise of that kind. So it is in the cases of wagers, and of agreements in restraint of trade outside the limited sanction given to them. In such cases we shall say that the object of the agreement is not unlawful if by "object" we mean the actual performance, but we shall say that it is unlawful if by "object" we mean the creation of an obligation to perform the things promised. This ambiguity is not cleared up by anything in the language of the Act. It does not, however, seem material for any practical purpose.

There is another possible reason, however, for the use of the word "consideration." A man may enter into a contract lawful in itself, and perform it in such a manner or by such means as to violate some distinct requirement or prohibition of the law. By so doing he may deprive himself of any claim to recover on the other party's promise to pay for his work, and this whether the other party knew anything beforehand of his unlawful action or not. Now in an agreement by mutual promises each of the promises is, properly speaking, the consideration, and the only consideration for the other, but in discussing the subsequent duties of the parties as to performance the word "consideration" is sometimes applied, in a loose and extended sense to those cases where the duty of performance on the one part is, according to the original intent of the agreement, conditional on previous or simultaneous performance on the other. In this inaccurate but not uncommon sense it may be said that, when a promisor who might have performed his promise lawfully performs it unlawfully, the consideration for the reciprocal promise becomes unlawful, and the language of the Act may have been designed to cover such cases. A typical English

(b) *Jaffer Meher Ali v. Budje Budge* 710 S. C. on appeal (1897) 31 Cal. Jute Mills Co. (1903) 33 Cal. 289

example is *Bensley v Bignold* (c), where a printer, having put a false imprint on a pamphlet, instead of his true name and address, as required by statute, was not allowed to recover the price of his work. It does not appear whether the defendant was a party to the falsification or not, or for what purpose it was done. Here a personal and quasi penal disability is imposed on the plaintiff for reasons of general policy without regard to the original character of the agreement, and with the result of conferring corresponding gain on the defendant, whose deserts may be no better in themselves. Practically it is convenient to treat these cases under the head of unlawful agreements, as the broad principles and the results are the same.

Unlawful intention, like negligence is not presumed by the law, nor is any man expected to presume it without evidence. Therefore, if a contract can on the face of it be lawfully performed, the existence of an undisclosed intention by one party to perform it unlawfully, or use it as part of an unlawful scheme, will not disable the other party from enforcing it at any rate by way of damages, and if the construction is doubtful, that construction which admits of a lawful performance is to be preferred. Again if there exists or arises a legal impediment, unknown to the parties at the time of contracting, to the performance of a contract in the manner which otherwise would have been the most obvious this will not of itself avoid the contract if it can still be substantially performed without breaking the law (d). But if both parties in fact contemplate an unlawful manner of performance, the case falls within the rule "that a contract lawful in itself is illegal if it be entered into with the object that the law should be violated" (d). A contemplated unlawful or immoral use of property (including money) to be obtained under a contract is an unlawful object within the meaning of this rule and this whether such use is part of the bargain or not and whether the party supplying the property is to be paid out of the profits of its unlawful use or not. If both parties know of the wrongful or immoral intention, the agreement is void, if the party who is to furnish the property does not know of it, the contract is voidable at his option when he discovers the other party's intent. This is well settled by English decisions (e).

(c) (1877) 5 B & Ald 355 24 R R Q B 202 see especially at pp 207, 208  
401 (e) *Eg Pearce v Brooks* (1866) L R

(d) *Waugh v Morris* (1873) L R 8 1 Ex 213 *Smith v White* (1866) L R

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With regard to the tendency of an agreement to "defeat the provisions of any law," these words must be taken as limited to defeating the intention which the Legislature has expressed, or which is necessarily implied from the express terms of an Act. It is unlawful to contract to do that which it is unlawful to do, but an agreement will not be void merely because it tends to defeat some purpose ascribed to the Legislature by conjecture, or even appearing, as matter of history, from extraneous evidence, such as legislative debates or preliminary memoranda not forming part of the enactment. It is not defeating the provisions of a law to take advantage of the lack of any provision for some particular case. If the enactment as it stands is intelligible, the Court cannot assume that the omission was not intended.

An agreement entered into with a fraudulent object is a particular species of the genus of agreements contemplating or involving injury to the person or property of another. The general term "injury" means criminal or wrongful harm. Evidently there is nothing unlawful in agreeing to carry on a business lawful in itself, though the property of rivals in that business may, in a wide sense, be injured by the consequent and intended competition.

There is no department of the law in which the Courts have exercised larger powers of restraining individual freedom on grounds of general utility, and it is impossible to provide in terms for this discretion without laying down that all objects are unlawful which the Court regards as immoral or opposed to public policy. The epithet "immoral" points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment. "Public policy" points to political,

1 Eq 626. But a transfer of property once executed in possession cannot be set aside on this ground. *Ayers v Jenkins* (1873) L. R. 16 Eq 275.

(f) *Fisher v Bridger* (1851) 3 F. & D.

312, 67 R. R. 701, 1 Ex. Ch.; *Geere v Mare* (1863) 2 H. & C. 339. 133 R. R. 707. This doctrine has been extra-judicially criticised but seems quite sound.

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English authorities on the subject of agreements being held unenforceable as running counter to positive legal prohibitions, to morality, or to public policy, are extremely voluminous and various. Many of them are inapplicable to the circumstances of British India, not that the elementary rules of law or morality differ in substance in England and in India, but because under the conditions of Indian manners and society such facts as are dealt with by certain classes of English decisions do not occur. References to some of the English cases on matters of general interest will be found in the judgments of Indian Courts digested below. Some topics on the other hand, are still of practical importance in India, though they are obsolete or all but obsolete in England. We proceed to discuss the several heads of the section with reference to the Indian authorities.

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speaking, that which has been forbidden in the public interest cannot be made lawful by paying the penalty for it, but an act which is in itself harmless does not become unlawful merely because some collateral requirement imposed for reasons of administrative convenience has been omitted. There was a time when the English Courts almost regarded it as meritorious to evade statutory regulations, and encouraged evasions of them by fine distinctions, but that attitude is long out of date, and examples of it cannot now be taken as precedents.

It is possible for a statute to attach a penalty to making a particular kind of agreement, and at the same time to provide that such an agreement, if made, shall not be, therefore, void. We do not know of more than one such case in England (g), or of any in British India.

Cases under this head have arisen principally in connection with Excise Acts, and they have almost all been decided with reference to English law. The principles may be stated thus: "When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed, [but they] are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e.g. the convenient collection of the revenue" (h).

The High Court of Bombay acted on these principles (i) where the question arose whether an agreement by a lessee of tolls from Government under the Bombay Tolls Act, 1875, to sublet the tolls was valid and binding between the lessee and sub-lessee. Sec 10 of the Act empowered the Government to lease the levy of tolls on such terms and conditions as the Government deemed desirable. One of the conditions of the lease was that the lessee should not sublet

(g) See Pollock on Contract, 363.  
Failure to observe special registry rules by the parties to a transfer of property does not make it unlawful. *Maung Le v. M.A. S. Firm* (1928) 6 Ran 423. 111 I C 105.

(h) Pollock on Contract pp 361-362.  
(i) *Dhakanbhai v. Hirabai* (1900) 24 Bom 622, followed *Abd Ush v. Al Ush Diga* (1927) 8 Lah 310, 100 I C 843; A I R 1927 Lah 333.

the tolls without the permission of the Collector previously obtained, and another condition empowered the Collector to impose a fine of Rs 200 for a breach of the condition. The lessee sublet the tolls to the defendant without the permission of the Collector, and then sued him to recover the amount which he had promised to pay for the sublease. It was contended on behalf of the defendant that the sublease was unlawful, as it was made without the permission of the Collector, and that the lessee was not therefore entitled to recover the amount claimed by him. But this contention was overruled. Parsons J., after citing the passage set forth above, said: "In our opinion this case falls within the latter class, *because the statute itself does not forbid or attach a penalty to the transaction of subletting*, but merely gives power to impose a condition under which it can be forbidden should the Collector see fit to do so for what can be only purely administration purposes. The Act imposing tolls is an Act passed for the benefit of the revenue and not an Act for the protection of public morals." Ranade J. said: "As a general rule, the law does not forbid things in express terms, but imposes penalties for doing them, and the imposition of such penalties implies prohibition, and an agreement to do a thing so prohibited is unlawful under section 23 of the Contract Act. As no penalties are prescribed under the [Tolls] Act, the agreement does not *prima facie* fall under the 1st clause of section 23." Similarly where the lessee of a ferry under the Madras Ferries Act, 1890, transferred the ferry to the defendant without the permission of the Collector as required by the terms of the lease, it was held that the transfer was not for that reason unlawful, as neither the Act nor any rule framed under the Act prohibited such transfer. In such a case, though the transfer may be invalid against Government, it is valid as between the transferor and transferee (j). Similarly where a license to cut grass was given by the Forest Department under the Forest Act, 1878, and one of the terms of the license was that the licensee should not assign his interest in the license without the permission of the Forest Officer, and a fine was prescribed for a breach of this condition, it was held that there being nothing in the Forest Act to make it obligatory upon the parties to observe the conditions of the license, the assignment would be binding upon

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(j) *Abdulla v Mammod* (1902) 26 Mad 156, *Gauri Shanker v Mumta Ali Khan* (1879) 2 All 411 [F B]

the parties, though it was competent to the Forest Officer to revoke the license if he thought fit to do so (k) The above Acts, which are intended solely for the protection of revenue, must be distinguished from Abkari and Opium Acts, which have for their object the protection of the public as well as the revenue Thus an agreement to sublet a license to sell arrack issued under the Madras Abkari Act, 1886 (l), or a license to manufacture and sell country liquor granted under the N-W P Excise Act, 1887 (m), or a license to sell opium issued under the Opium Act, 1878 (n), or a license to manufacture salt under the Bombay Salt Act, 1890 (o), without the permission of the Collector, is illegal and void, the sublease in each case without such permission being prohibited by statute, and no suit will lie to recover any money due or any sum deposited under such an agreement The result is the same where the holder of such a license does not actually sublet or transfer the license, but does an act which amounts to a sublease or a transfer, as where he sells his business in an excisable article in consideration of a money payment with leave to the purchaser to carry on the business in his name, and obtains an indemnity from the purchaser against all loss, claims and demands in respect of the business In that case he cannot recover from the purchaser either the consideration money or payments made by him for debts contracted by the purchaser in the business and covered by the indemnity (p) Similarly, a partnership agreement entered into in violation of the terms of a license granted under the Bombay Abkari Act, 1877, which prohibited the licensee from admitting any partner in the business, the violation being punishable under the Act, is void as forbidden by law (q), and if a person, being aware of this prohibition, does join as

(k) *Naralla v Babamya* (1916) 40 Bom 64, 30 I. C 913

(l) *Thithi Pakuradasu v Bheemudu* (1902) 26 Mad 430

(m) *Debi Prasad v Rup Ram* (1888) 10 All 577 As to what amounts to a sub lease, *Padhey Shivam v Mewa Lal* (1928) 116 I C 89, A I R 1929 All 210, *Ialepu Narayanamurthy v Mallapudi Subrahmanyam* (1928) 114 I C 655, A I R 1929 Mad 119

(n) *Paghnath v Nathu Harys* (1894) 10 Bom 626

(o) *Jemals v Paghnath* (1909) 33

Bom 636, *Rabiahibi v Gangadhar* (1922) 24 Bom L R 111, 66 I C 393

(p) *Dehari Lall v Jagdish Chander* (1904) 31 Cal 798

(q) *Hormaji v Jestinga* (1887) 12 Bom 422 In a modern Punjab case it was held that a partnership agreement by a licensee under the Excise Act VII of 1896 which applies in Northern India, Burma, and Coorg was not void under this section as it did not contravene any of the rules framed under that Act *Bisheshwar Das v Govind Ram* (1909) 1 Junj Rec no 114

a partner, and advances capital for that purpose, he cannot recover back the amount advanced (r) Where a rule framed under the Madras Abkari Act, 1886, prohibited, on pain of a fine, the holder of a license for the sale of toddy from being interested in the sale of arrack and the holder of a license for the sale of arrack from being interested in the sale of toddy, it was held that an agreement of partnership in the business of selling arrack and toddy entered into between a holder of a license for the sale of toddy and the holder of a license for the sale of arrack was void, and that neither party could sue the other for the recovery of money due to him in respect of the partnership (s)

But a condition prohibiting the licensee from "selling transferring or subletting" has been held not to prohibit the licensee from admitting partners in the business to which the license relates (t) The same has been held of a condition prohibiting the licensee from "subletting, selling, mortgaging or otherwise alienating whole or in part the privilege granted by this license of manufacturing salt" (u) The sale of fermented liquor without a license, such a sale being punishable under the Bengal Excise Act, 1878, is unlawful, and the vendor is not entitled to recover the price thereof from the buyer (v)

In a recent Madras case an agreement by a Madras District Municipality by which it farmed out its right to collect fees on the slaughter of animals was held void as being *ultra vires* so that the Municipality could not sue on it The Court said 'The powers of a Corporation must be strictly construed and it is hardly too much to say that what is not permitted to such a body is forbidden' (w) But this according to current English authorities, is not accurately expressed There is no such rule of construction as supposed and acts *ultra vires* are not *forbidden*, the attempt to do such an act is a

(r) *Gopalrao v Kallappa* (1901) 3 Bom L R 164

(s) *Marudamuthi v Rangasami* (1900) 24 Mad 401 But the illegality of a partnership affords no reason why it should not be sued *Brahmajya v Hamiah* (1920) 43 Mad 141 54 I C 45

(t) *Gauri Shanker v Mumta Ali* (1879) 2 All 411 413 *Karsan v Gattu* (1913) 37 Bom 320, 19 I C 442

(u) *Champsey Dossa v Gordhandas Aessouji* (1917) 19 Bom I R 381 40

I C 805 In *Nalain Padmanabham v Sait Badrinadh* (1912) 35 Mad 58° 10

I C 126 it was assumed that the words "You shall not sell transfer or subrent your privilege" included the admission of partners

(v) *Boistub Churn v Wooma Churn* (1889) 16 Cal 436

(w) *Municipal Council Kumbakonam v Abbah Sahib* (1913) 36 Mad 113 11 I C 669

nullity (x) Cases on the doctrine of *ultra vires* are not really relevant to s 23

Agreements to assign or sublet licenses granted under the excise laws must be distinguished from agreements to sublet a contract with a public department (y) Thus in a Bombay case (z) the defendant contracted with the Executive Engineer of the Public Works Department to supply materials for the construction of a public road One of the conditions of the contract was that no work was to be underlet by the contractor without the express permission in writing of the Executive Engineer or his duly authorised agent Subsequently the defendant, without obtaining the requisite permission, entered into an agreement with the plaintiff under which the plaintiff was to do the contract work, and the defendant to pay him all the moneys that might be received by him from the Executive Engineer under the contract after deducting 10 per cent as the defendant's profit It did not appear that the plaintiff knew of the condition against underletting contained in the contract The plaintiff sued the defendant for the balance of money due to him under the agreement It was held that, as the plaintiff did not appear to have any knowledge of the restrictive condition in the contract, he was entitled to enforce his own contract against the defendant The Court did not consider it necessary to decide whether the sub contract was void as opposed to public policy at the same time intimating its opinion that the sub contract was to be distinguished from the subletting of a license granted under the excise laws and intended by the Legislature for the use of the licensee only It was further held that even if the plaintiff could not enforce his contract, he was at all events entitled under the circumstances to receive from the defendant compensation for the work and labour of which the defendant had received the benefit

“Defeat the provisions of any law”—The term ‘law’ in this expression would seem to include any enactment or rule of law for the time being in force in British India This branch of the subject may thus be considered under three heads according as the object or con-

(x) See Pollock on Contract 135 136

(y) The formation of a partnership by a contractor with the Forest Department for executing the work under his direction is in itself only a matter of agency and not a subletting of his rights

contrary to the Forest Act *Valadi Venkatanandram v Immadetty Dhanu raju* (1905) 11 I C 208 A I I 1905 Mal 659

(z) *Cannalwar v Dimaier* (1906) 21 Bom 50

sideration of an agreement is such as would defeat (1) the provisions of any legislative enactment, or (2) the rules of Hindu or Mahomedan law, or (3) other rules of law for the time being in force in British India

1 **Legislative enactments**—Where a lessee of a village from a zamindar agreed to collect from the ryots and pay over to the zamindar an annual festival cess up to that time recovered by the zamindar, it was held that the zamindar could not recover from the lessee the amount of the cess collected by him, the cess being of a nature prohibited by the Bengal Rent Recovery Act X of 1859, s 10 (a) Where a tenant agreed by a registered Kabuliata to deliver to his landlord in addition to rent certain agricultural produce, and further to supply the landlord with a cart and bullocks when necessary, and in default to pay the cash value of the said dues along with the rent, it was held that the agreement was one to pay cess, and was therefore void as being barred by the provisions of the U P Land Revenue Act III of 1901, s 56 (b) And where the manager of a temple at Broach sued the defendant to establish the right of the temple to levy a cess on cotton purchased in Broach and exported from it it was held that, assuming that the defendant impliedly assented to pay the cess, the agreement was unlawful as being against the provisions of the Bombay Town Duties Act XIX of 1844, which abolished cesses of every kind not forming part of the land revenue (c) Similarly where A was required under the Code of Criminal Procedure (d) to furnish a surety for his good behaviour, and B agreed to become a surety on condition that A would deposit with him the sum in which he was required to go bail and the deposit was made it was held in a suit brought after the expiry of the period of suretyship that A was not entitled to recover the deposit from B as the effect of the agreement was to defeat the provisions of the Code by rendering B a surety only in name (e) Likewise, a surety who has given a bail for an accused

(a) *Kamala Kant Chose v Kalu Mahomed* (1869) 3 B L R A C 44  
But an agreement to perform defined services in lieu of rent is not an illegal imposition on the tenant within the Bengal Tenancy Act *Palku Hari v Narendra Nath Chatterjee* (1929) 115 I C 34, 49 Cal 1 1 189 A I R 1929 Cal 224

(b) *Sis Pam v Arghar Ali* (1913) 35 All 19

(c) *Costants Shri Purushodamji Maharaj v Pals* (1884) 8 Bom 398

(d) Then Act V of 1872 s 505 now Act V of 1898 s 107

(e) *Fateh Singh v Sarwal Singh* (1879) 1 All 751

person cannot recover from the accused the bail which has been forfeited in consequence of the accused failing to appear when required by the Court which released him on bail (f) And it is conceived that a suit will not lie to recover the amount of a loan by a British subject to a native prince in India without the consent of the Government, such loans being prohibited by the East India Company's Act, 1797 (37 Geo III c 142, s 28) But where an agreement is merely "void" as distinguished from "illegal," *e g*, an agreement to give time to a judgment debtor without the sanction of the Court (g), either party may, on performing his part of the contract, enforce the contract as against the other (h) It is not illegal to deal with an irregular unregistered association in ignorance of its character (i)

The provisions of the Insolvent Debtors Act afford further illustrations of the class of agreements now under consideration Thus an agreement by which an insolvent who has obtained his personal but not his final, discharge settles the claim of one creditor without notice to the official assignee or his other creditors and by which that creditor agrees not to oppose his final discharge, is void as in fraud of the creditors and as inconsistent with the policy of that Act (j) Similarly a promissory note whereby a creditor secures for himself a larger payment from an insolvent than what he is entitled to under a composition deed is void where the other creditors are not aware of the arrangement The same principle applies even though the note may have been passed to the creditor by a third party if it is done with the insolvent's knowledge (k) And a composition deed whereby a debtor assigned the whole of his property to trustees for the benefit of such of his creditors as should sign the deed within a certain period is void as against the official assignee (l) On like grounds a collusive assignment of a contract by a party thereto on the eve of his insolvency to

(f) *Sunder Singh v Kishen Chand* (1899) Punj Rec no 1 *Bhupati Ch Vandy v Golam FA bar Chowdry* (1919) 24 C W N 368 50 I C 539

(g) Such an agreement was declared to be void under the Code of Civil Procedure 1889 s 25A That section is not re-enacted in the Code of Civil Procedure 1908

(h) *Bank of India v G. S. S. S. S. S.* (1891) 16 Bom 618 See also *Shy S. S. S. S. S. S.*

*bal Municipality* (1903) 28 Bom 60 "3

(i) *Appa Dula Patil v Pankajdas Jandro Jais* (1930) 53 Bom 6, 121 I C 581 A I R 1930 Bom "

(j) *Narayan v S. S. S. S. S. S.* (1890) 20 Bom 630

(k) *Krishnakumar Chela v Admala Muthu* (1896) 20 Ma 1 64 *Mahamati v Parameswara* (1906) 10 Ma 1 I J 418

(l) *Mammothadas v A C Mahesh* (1897) 20 Bom "

his brother in law with the object of defrauding his creditors is void under this section and s (6), cl (h), of the Transfer of Property Act, 1882 (m), as the effect of such an assignment is to defeat the provisions of the Insolvency Act by preventing the benefit of the contract from vesting in the official assignee (n) An official assignee must not raise money for pursuing a suit for the estate by agreeing with creditors who advance it to give preference to their debts (o)

A mortgage of immovable property belonging to a minor by a person holding a certificate of administration in respect of the estate of the minor under the Bengal Act XL of 1858 (p) is void where it is made without the sanction of the Court, even though the mortgage money was advanced to liquidate ancestral debts and to save an ancestral property from sale in the execution of a decree (q) Where a specific kind of land or specific rights in land have been declared by the Legislature to be not transferable a transfer of such land or rights in land is void, as to permit it would be to defeat the provisions of the law within the meaning of the section (r) Thus a sale by occupancy tenants of occupancy rights is void, it being of such a nature that if permitted it would defeat the provisions of the N W P Rent Act (s) Similarly an agreement to transfer the rights of an ex proprietary tenant in a *mahal* is illegal, as it would defeat the provisions of the N W P Rent Act XII of 1881, s 7 (t) But there is nothing in the provisions of the latter Act to render an assignment by a *lambardar* of the profits of a *mahal* unlawful under this section (u) A usufructuary mortgage of an occupancy holding by an occupancy tenant is void under this section for if permitted, it would defeat the provisions of

(m) Clause (h) of s 6 of the Transfer of Property Act provides that no transfer can be made for an unlawful object or consideration within the meaning of s 23 of the Contract Act

(n) *Jaffer Meher Ali v Budge Budge Jute Mills Co* (1907) 34 Cal 289 on appeal from (1906) 33 Cal 702

(o) *Re Purushothamdoss* (1927) 118 I C 120, 55 Mad L J 657, A I R 1929 Mad 385

(p) Repealed by the Guardian and Wards Act VIII of 1890 of which see ss 29 and 30.

(q) *Chimman Singh v Subran Kaur*

(1880) 1 All 902

(r) *Phalli v Matabadal* (1883) All W N 7 (a case under N W P Rent Act XII of 1881 s 9 relating to occupancy rights), *Indar v Khushli* (1886) All W N 88 (a case under N W P Revenue Act XIX of 1873 s 125 relating to *sir* land)

(s) *Jhingura v Durga* (1885) 7 All 878

(t) *Kashi Prasad v Kedar Nath Sahu* (1897) 20 All 219

(u) *Chadma Lal v Kishen Lal* (1894) All W N 17 *Bhagwan Das v Bhajju Mal* (1894) All W N 140

the Agra Tenancy Act II of 1901, s 21 (v) Similarly an agreement by an ex-proprietary tenant to pay rent for his ex-proprietary holding at a rate higher than that prescribed by s 10 of that Act, is void, as it would make the provisions of that section entirely nugatory (u) But the Judicial Committee has held that an agreement by the defendants for relinquishment of all their *Sir* and *Khudkasht* lands and ex proprietary rights therein to the plaintiffs none of whom were at the date of the agreement proprietors, landholders or co sharers in the land to be relinquished, and for payment of damages for any breach of the agreement by them, is illegal and void as being in contravention of the policy of the said Act (x) And where a specific individual has been declared, under an Act, to be incompetent to transfer land belonging to him a transfer of his land by that person is void under this section, and such a transfer cannot be enforced even after removal of the disability (y) Leases granted by a landlord with the object of securing more than the standard rent and of ousting tenants in occupation of the premises may be void if they be of such a nature as to defeat the provisions of the Calcutta Rent Act, 1920 (z) And it has been held by the High Court of Madras that an agreement by a debtor not to raise the plea of limitation is void under this section, as it would defeat the provisions of the Limitation Act (a), though not avoided by s 28 (see notes thereon below) But a stipulation for payment of compound interest, though not allowed by the Regulations in force in the Santhal Perganas (b), is not unlawful within the meaning of the present section (c) Nor is an alienation made pending a temporary injunction under s 192 of the Civil Procedure Code [now O 39, r 1] unlawful under this section (d) A loan by a military officer to a man under his command is not unlawful as being against

(v) *Ram Sarup v Kishan Lal* (1907) All W N 76

(w) *Jag v Sital* (1914) 36 All 155, 22 I C 965 Similarly of a contract for the sale of land contravening the rule against perpetuities *Dinkarrao v Narayan* (1922) 24 Bom I R 449 (1923) 47 Bom 191

(x) *Moh Chand v Ikram Ullah Khan* (1917) 39 All 173 79 I C 454

(y) *Pritika Devi v Kamod Singh* (1904) 30 All 33 (a case under Judicial Incumbered Estates Act XVI of 1892 s 8

relating to disqualified zamindars)

(z) *Saleh Ibrahim v Manelji Corcoran* (1923) 50 Cal 491 75 I C 521

(a) *Dallapragada v Thummana* (1917) 40 Mad 701 35 I C 575

(b) Regulation III of 1872, s 6 and Regulation V of 1893 s 24

(c) *Shama Charan v Chuni Lal* (1898) 21 Cal 238

(d) *Manohar Das v Jagan Nath* (1900) 23 All 471

the law, though such a loan may be against the rules of discipline (c) A compromise of a suit whereby the defendant agrees to a mortgage decree being passed against him even in respect of a claim not secured by a mortgage is not unlawful or opposed to public policy (f) There is nothing in the Bengal Drainage Acts (g) to render invalid a contract between a landlord and his tenant by which the latter agrees to pay the former drainage cost in respect of land on which rent has for the first time been imposed in consequence of a scheme of works carried out under the Acts benefiting it (h) A bond passed by a ward of the Court of Wards is void But if after the death of the ward, and after the estate is released from the Court of Wards, the son of the deceased ward obtains a fresh advance from the lender and passes a bond for a sum which includes the loan to the deceased, the bond is valid even as regards that loan, provided it is proved that the lender refused to make a fresh advance unless the son agreed to pay all the loan made to the father (i)

2 Rules of Hindu and Mahomedan law—An agreement that would defeat the provisions of Hindu law would be unlawful within the meaning of the present clause A contract to give a son in adoption in consideration of an annual allowance to the natural parents is an instance of this class, and a suit will not lie to recover any allowance on such a contract, though the adoption may have been performed The Hindu law does not recognise in this *kali yug* any adoption but that of a *dattak* son, and such a son is defined in the *Dattaka Chandrika* (s 1, par 12) as a son “*affectionately given by his father or mother*” Besides defeating the provisions of the Hindu law such an agreement would involve an injury to the person and property of the adopted son, “inasmuch as if it could be proved that the boy was purchased and not given, it is very probable that the adoption would be set aside and if such adoption were set aside he would not only lose his status in the family of his adopting father, but also lose his right of inheritance to his natural parents” (j)

(c) *Asa Singh v Satta Singh* (1873) Punj Rec no 16

(f) *Bhutanagiri Subbarayudu v Maradugula Venkataratnam* (1907) 17 Mad L J 200

(g) Act VI of 1880 and Act II of 1902

(h) *Jyoti Kumar v Hari Das* (1905) 32 Cal 1019

(i) *Bindeshri Prasad v Sarju Singh* (1923) 21 All L J 446 73 I C 458

(j) *Eshan Kishor v Hari Chandra* (1874) 13 B L R App 42, *Sitaram*

**3 Other rules of law in force in British India**—It is now a settled principle of law that where a decree is silent as to subsequent interest on the amount decreed, interest cannot be recovered by proceedings in execution of the decree (x) But an agreement in the nature of a compromise between a decree holder and a judgment debtor, which proceeds upon ignorance common to both parties thereto, as to the above principle, is not illegal as defeating the provisions of that law (y) Again, it is a well established rule of law that, unless a will is proved in some form, no grant of probate can be made merely on the consent of parties Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful so as to be enforceable under the provisions of s 375 of the Civil Procedure Code [now O 23, r 3] (z) Similarly, a receiver being an officer of the Court, the Court alone is to determine his remuneration, and the parties cannot by any act of theirs add to, or derogate from, the functions of the Court without its authority (a) A promise therefore, to pay the salary of a receiver without leave from the Court even if unconditional, being in contravention of the law, is not binding on the promisor (b) But an agreement providing for remuneration to be paid to an executor not out of the assets of the testator but from the pocket of a third person is neither forbidden by the Administrator General's Act 1871, s 56 (c), nor is it one which if permitted would defeat the provisions of that Act nor is it against public policy (d)

**"Fraudulent"**—A sale of immovable property pending a suit against the vendors to recover a debt is not invalid merely because the motive of the vendors may have been to prevent the land from being attached and sold in execution In such a case the only question is whether the sale was a real transfer of the title to the land for a fair money consideration The motive of the vendors to defeat the execution of any decree that may be passed against them is immaterial (e)

(x) *Pillai v Pillai* (1875) 15 B I R 783, 1 R 21 A 219

(y) *Seth Gokul Dass v Murlis* (1878) 3 Cal 602

(z) *Monmohini Guha v Bangsi Chandra Jais* (1907) 71 Cal 357

(a) See Civil Procedure Code, O 40 r 1

(b) *Prolash Chandra v Adham* (1903) 30 Cal 636

(c) This section has been repealed see Act of 1902 s 4

(d) *Narayan Coomars Jais v Shajani Kantu Chatterjee* (1894) 22 Cal 14

(e) *Ellen Chetty v Jamalappa Chetty* (1870) 1 M H C 708 & *settling* 1

In this connection may be noted the provisions of s. 53 of the Transfer of Property Act IV of 1882. That section provides *inter alia* that "every transfer of immovable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defeated or delayed," but that "nothing in this section contained shall impair the rights of any transferee in good faith and for consideration." Such a transfer is not illegal, for the section merely declares that it shall be *voidable* at the option of the party affected by the transfer. Where the object of an agreement between A and B was to obtain a contract from the Commissariat Department for the benefit of both, which could not be obtained for both of them without practising fraud on the Department it was held that the object of the agreement was fraudulent, and that the agreement was therefore void (f). But an agreement between A and B to purchase property at an auction sale jointly, and not to bid against each other, is perfectly lawful (g).

**"Injury to the person or property of another."**—The consideration or object of an agreement is unlawful when it involves or implies injury to the person or property of another. A mortgage bond, whereby a person who is entitled to a moiety only of certain property mortgages the whole of that property, is not void under this section as to the moiety belonging to him, merely because he purports to mortgage the other moiety also not belonging to him (h). A bond which compels the executant to daily attendance and manual labour until a certain sum is repaid in a certain month and penalises default with overwhelming interest is unlawful and void. "such a condition," the Court said "is indistinguishable from slavery and such a contract is, in our opinion, opposed to public policy and not enforceable" (i). For another

*Sankarappa v Kamayya* (1866) 3 M H C 231, and *Gnanabhas v Srinivasa Pillai* (1868) 4 M H C 84. See also *Rajan Harji v Ardesht Hormuzji* (1879) 4 Bom 70.

(f) *Sahib Ram v Nagar Mal* (1884) Punj Rec no 63.

(g) *Nanda Singh v Sunder Singh* (1901) Punj Rec no 37. *Quis negavit?*

(h) *Jogu Moken Deb v Dardoon Burman* (1908) 12 C W N 94.

(i) *Ram Sarup v Bansi Mandar* (1915)

42 Cal 742, 30 I C 955, *Satish Chandra v Kashi Sahu* (1918) 3 Pat L J 412, 46 I C 418. But see *Anandiram v Goza* (1918) 27 Cal L J 459, 45 I C 965 where the Court was inclined to a different opinion, and dist. *Karuppannan v Pambayan* (1925) 101 I C 39, A I R 1927 Mad 531 (no penal interest). *Wallis v Day* (1837) 2 M & W 273, 46 R R 602, decided only that a covenant to serve in a certain trade for life and not exercise it otherwise, is

instance of an agreement void under this head, see the adoption case cited in the notes to this section under the head "Rules of Hindu and Mahomedan Law," p 159, above

"Immoral."—A landlord cannot recover the rent of lodgings knowingly let to a prostitute who carries on her vocation there (j) Otherwise, if the landlord did not know that the lodging were required for prostitution (l) Similarly, money lent to a prostitute expressly to enable her to carry on her trade cannot be recovered (l) Likewise money advanced by the plaintiff to the defendant to enable the defendant to continue cohabitation with a dancing girl cannot be recovered (m) On like grounds, ornaments lent by a brothel keeper to a prostitute for attracting men and encouraging prostitution cannot be recovered back (n) An assignment of a mortgage to a woman for future cohabitation is void, and it can be set aside at the instance of the assignor though partial effect may have been given to the illegal consideration (o) And it has been held that money paid by a wife to a third person to be given as a bribe to a gaoler for procuring the release of her husband from gaol could not be recovered back on failure of the gaoler to procure the release (p) Similarly, where the plaintiff advanced moneys to the defendant, a married woman, to enable her to obtain

not in itself in excessive restraint of trade *Cp Pollock on Contract* p 441, ed 9

(j) *Gaurinath Moolerjee v Madhumani Peshakar* (1872) 9 B L R App 37, *Parthi Mal v Mussammatt Bhagan* (1898) Punj Rec no 2, *Brankman v Abdul Ghafur* (1904) Punj Rec no 65, *Bani Mancharam v Regina Stanger* (1907) 32 Bom 581, at pp 586 et seq *Choga Lal v Piyars* (1908) 31 All 58 The award of mesne profits in ejectment in *Mariam Begum v Mungu* (1928) 113 I C 360, A I R 1928 Sind 173 is unintelligible as reported

(k) *Sultan v Vanu* (1877) Punj Rec no 22

(l) *Bhole Balsh v Gulia* (1876) Punj Rec no 61

(m) *Pannichand v Nanon Sanler* (1909) 18 Mad L J 450

(n) *Alla Balsh v Chana* (1877) Punj

Rec no 26 A similar English case is *Pearce v Brooks* (1866) L R 1 Ex 213 (goods sold to a prostitute known by the seller to be such, and to want the goods for the purpose of enabling her to make a display favourable to her immoral purposes)

(o) *Thas Muthulannu Shunmugavelu* (1905) 28 Mad 413, *Kandaswami v Narayanaswami* (1923) 45 Mad L J 551, 76 I C 306 See also *Alice Mary Hill v William Clark* (1905) 27 All 200 and *Mussammatt Roshun v Muhammad* (1857) Punj Rec no 40, *Ohuma v Ram Chandra Pao* (a flagrant example) (1925) 63 I C 411 A I R 1925 All 437; and note that agreements of this class are wholly void not merely voidable All these cases are quite plain on the principles of English law

(p) *Protima Aurat v Dulhian Sclar* (1872) 9 B L R App 79

a divorce from her husband, and the defendant agreed to marry him as soon as she could obtain a divorce, it was held that the plaintiff was not entitled to recover back the amount, as the agreement had for its object the divorce of the defendant from her husband, and the promise of marriage given under such circumstances was *contra bonos mores* (q). An agreement to pay money upon the consideration that the plaintiff would give evidence in a civil suit on behalf of the defendant cannot be enforced. Such an agreement may be for giving true evidence and then there is no consideration, for "the performance of a legal duty is no consideration for a promise", or it may be for giving favourable evidence either true or false, and then the consideration is vicious (r). There is nothing in this decision, or in the reasons for it, to invalidate an expert's claim for services rendered in the way of professional investigation, though he may afterwards become a witness for his employer in a litigation arising out of the same facts.

Under the Common Law of England, and presumably under any monogamous law of marriage in a jurisdiction where promises of marriage are actionable, an agreement between a married man and a woman who knows him to be married to marry one another after the wife's death is void as being contrary to morality and public policy (s).

A loan made for the purpose of teaching singing to *nautins* (dancing girls) has nothing immoral in its object, for although it might be true that most of the *nautins* who sing lead a loose life, singing is a distinct mode of obtaining a livelihood, not necessarily connected with prostitution (t). And it has been held by the High Court of Allahabad that a suit will lie for arrears of allowance agreed to be paid to a woman for past cohabitation (u). The Court observed: "Such a consideration is

(q) *Bas Iyji v. Ansa Nagar* (1885) 10 Bom 152; *Mussammatt Jashun v. Muhammad* (1887) Punj Rec no 46.

(r) *Sashannah Chetty v. Jamasamy Chetty* (1868) 4 M H C 7.

(s) *Wilson v. Carnley* [1908] 1 K B 729 C 1 confirming *Spiers v. Hunt* 15 720. It seems to be still good law that a promise of marriage made by a person who is married and conceals the fact from the promisee is actionable at the suit of the innocent promisee on the ground of the promisor's implied war-

ranty that he can lawfully make an offer to perform the promise. *Willward v. Littlewood* (1850) 5 Ex 775. 82 R R 871. This however may be of little importance in India.

(t) *Akhubchand v. Beram* (1888) 13 Bom 150.

(u) *Dhiraj Kuar v. Bikramajit Singh* (1881) 3 All 78. See also *Man Kuar v. Jasodha Kuar* (1877) 1 All 478. Both these cases were referred to in *Lalsahni Narayana v. Subhadra Ammal* (1903) 13 Mad L J 7, where Bhasbham Aiyangar



influence, any public servant to do an official act or show any favour? If he did not, the contract cannot be treated as illegal, and we are of opinion that the written agreement does not properly admit of such a construction." Here the principle was applied (p 117, above) that, where it is possible to perform an agreement by lawful means according to its terms, an unlawful intention will not be presumed, and any party alleging such an intention must prove it.

**"Opposed to public policy."**—The general head of public policy covers, in English law, a wide range of topics. Agreements may offend against public policy by tending to the prejudice of the State in time of war (trading with enemies, etc.), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance) or, in private life, by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling. Some of these matters are separately dealt with in the Contract Act (see ss 26 and 27, below). It is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No Court can invent a new head of public policy (z), it has even been said in the House of Lords that "public policy is always an unsafe and treacherous ground for legal decision" (a). This does not affect the application of the doctrine of public policy to new cases within its recognised bounds (b).

**1 Trading with enemy.**—Agreements alleged to amount to trading with an enemy or otherwise to operate in the enemy's favour in time of war do not appear to have come before the Courts of British India before the war of 1914. It is long settled law that all trade with public enemies without licence of the Crown is unlawful. "The King's subjects cannot trade with an alien enemy, i.e., a person owing allegiance to a Government at war with the King, without the King's licence" (c). This includes shipping a cargo from an enemy's port even

(z) Lord Halsbury, *Janson v Drie fontein Consolidated Mines* [1902] A C 484 491. See also *Shrinivasdas Lakshminarayan v Ramchandra Ramrattandas* (1919) 44 Bom 6, 52 I C 546.

(a) Lord Davey [1902] A C at p 500. Lord Lindley at p 507, in very similar

words cited in *Gouind v Iacheco* (1902) 4 Bom L R 948.

(b) See *Wilson v Carnley* p 165, above.

(c) Lord Macnaghten *Janson v Drie fontein Consolidated Mines* [1902] A C at p 499.

in a neutral vessel (d) As a consequence of this, "no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government" (e) If the performance of a contract made in time of peace is rendered unlawful by the outbreak of war, the obligation of the contract is suspended or dissolved according as the intention of the parties can or cannot be substantially carried out by postponing the performance till the end of hostilities (f) In such a case a contracting party is not bound to perform a part of his undertaking which remains possible and lawful in itself, but would be useless without the rest (g) The recent development of cases of this class is dealt with under s 56 below The rules under this head become applicable only when an actual state of war exists They cannot be made to relate back to a time before the war, though war may have been apprehended A contract of insurance made before war cannot be vitiated, as regards a loss by seizure also before any act of public hostility, by the fact that war did break out shortly afterwards (h)

During the recent general war these principles have been confirmed and in some directions developed One question found to need further definition was who is an enemy for the purpose of the rule and especially how the friendly or hostile character of an incorporated company is to be tested The seat of a man's business is of more importance than his domicile in the technical sense or even nationality (for an enemy subject allowed to remain here under the King Emperor's protection is not a commercial enemy, and enemy subjects residing in friendly countries need not be), and in the case of a corporation the jurisdiction in which it is registered does not conclusively determine its character nor yet the nationality of its individual shareholders and it must be considered by whom and in what interest its affairs are in fact controlled (i)

(d) *Pots v. Bell* (1800) 8 T. 1 548, 5 R. R. 452 *Ego to v. Pohlen* (1857) 7 F. & B. 763, 110 R. 1 8

(e) Lord Mansfield *Janson v. Dreyer* 10 C. 100 [190] A. C. 400

(f) *Ego to v. Pohlen* (1857) 7 F. & B. 763, 110 R. 1 8

(g) *Copel v. Smith* (1857) 11 Q. B. 404

(h) *Janson v. Dreyer* 10 C. 100 [190] A. C. 400

(i) *Singh v. Dhillon* 10 C. 100 [190] A. C. 400

(j) *Id. v. Dhillon* 10 C. 100 [190] A. C. 400

(k) *Id. v. Dhillon* 10 C. 100 [190] A. C. 400

(l) *Id. v. Dhillon* 10 C. 100 [190] A. C. 400

(m) *Id. v. Dhillon* 10 C. 100 [190] A. C. 400

(n) *Id. v. Dhillon* 10 C. 100 [190] A. C. 400

(o) *Id. v. Dhillon* 10 C. 100 [190] A. C. 400

An executory contract between parties of whom one becomes an alien enemy is thereby suspended or dissolved according to the nature of the case. It is dissolved if it contemplated a continuous performance which in the state of war would entail intercourse with the enemy, or if the continuance of duties to be performed after the war would assist the enemy's trade, or if the maintenance of the contract is otherwise against public policy, or if suspension of the current execution would substantially be imposing a new contract on the parties. An express suspensive condition in general terms is in no way conclusive. It may not be applicable to the event of war, or it may be contrary to public policy (j)

2 **Stifling prosecution** — Agreements for stifling prosecutions are a well known class of those which the Courts refuse to enforce on this ground. The principle is "that you shall not make a trade of a felony" (k). In England the compromise of any public offence is illegal. If the accused person is "innocent, the law [is] abused for the purpose of extortion, if guilty, the law [is] eluded by a corrupt compromise screening the criminal for a bribe" (l). It is not necessary to prove that there was any express threat of prosecution if the transaction in fact amounted to a bargain not to prosecute, and if the Court thinks the defence of illegality a disreputable one to raise in the circumstances, the only way in which it can give effect to its opinion is in dealing with the costs (m). But the English common-law rule, that contracts for the compounding or suppression of criminal charges for offences of a public nature are illegal and void, has no application to a contract for compounding the prosecution of criminal proceedings for an offence against the municipal law of a foreign country and committed there, if such a contract is permitted by the law of that country, and this whether the contract is entered into there or in British territory

control see the *Clapham Steamship Co* & case [1917] 2 K B 639

(j) *Fidel Bieber & Co v Pio Tinto Co* [1918] A C 260, *Naylor, Benson & Co v Kraussche Industrie Gesellschaft* [1918] 1 K B 331 affirmed *very shortly* [1918] 2 K B 486, *Zinc Corporation v Hirsch* [1916] 1 K B 541, C A. We deal elsewhere with the effects of war conditions on contracts to which there is not an

enemy party see Notes on s 56

(k) Lord Westbury *Williams v Bagley* (1866) L R 1 H L 200 220

(l) *Keir v Leeman* (1844) 6 Q B 308, 66 P R 392, 9 Q B 371 392, 72 P R 298, *Windhill Local Board v Vent* (1890) 45 Ch Div 357

(m) *Jones v Merionethshire Building Society* [1902] 1 Ch 178, C A

A suit will, therefore, lie in British India on a bond passed to the plaintiff in consideration of his withdrawing a prosecution for theft instituted in the French Court at Pondicherry, the agreement being permissible by the French law (n) It would be difficult, indeed, to hold that the compromise of a French law suit in a manner allowed by French law could be injurious to the administration of justice in British India

A compromise of proceedings which are criminal only in form, and involve only private rights, may be lawful (o) This perhaps is of no importance in Indian practice, where we have a statutory list of compoundable offences (p) "The criminal law of this country makes a difference between various classes of offences With regard to some, it allows the parties to come to an agreement and either not to take proceedings or to drop the proceedings after institution in a few instances even without the leave of the Court, and, in other instances,

(n) *Subraya Pillai v Subraya Mudali* (1867) 4 M H C 14 Reference was made in the course of the judgment to the rule of private international law that

the law of the place of a contract governs its validity That expression, however, is ambiguous The local law governing the substance of a contract may according to the circumstances be that of the place where it was made or of that where it is to be performed and these are only auxiliary tests for ascertaining the intention of the parties as to what law is to prevail *Hamlyn & Co v Talisker Distillery* [1894] A C 202, *Dicey, Conflict of Laws*, 591 *seq* 4th ed *Kaufman v Gerson* [1904] 1 K B 591, C A looks at first sight *contra*, but the Court seems to have been influenced by peculiar facts and it is far from clear that the decision was intended to lay down any general rule of law And see p 12, above

(o) *Fisher & Co v Apollinaris Co* (1875) L P 10 Ch 297, as qualified by *Wentworth Local Board v East* (1890) 45 Ch Div 351 Cp *Bhendra Nath Das v Bhawanji Kumar Das* (1927) 91 I C 624, A I R 1926 Cal 519 where the criminal

complaint though nominally of forgery, was merely an incident in a dispute about property *Tel Chand v Haryas Rai Arjan Das* (1929) 117 I C 74, A I R 1929 Lah 564

(p) See s 345 Criminal Procedure Code 1898 see also Penal Code ss 213, 214 But even as to a non compoundable offence the withdrawal of a petty charge, as an incident in a fair compromise does not avoid the compromise *Onkar Mal v Ishig Ish* (1927) 41 All 510 100 I C 499 A I R 1927 All 318 Also there must be better evidence of compounding than the mere withdrawal of a complaint see *Sadho Khandu v Jhindu Auer* (1929) 116 I C 749 A I P 1930 All 456, *Haryas Rai Arjan Das* (1929) 101 I C 786, A I R 1927 Lah 467 *Shanti Sarup v Lal Chand* (1927) 100 I C 444, 28 P I R 788 9 Lah I P 319 A I R 1927 Lah 537 The Court cannot act on a mere surmise that the acts of the parties were in substance one transaction It is a distinct question not relevant here whether the use of criminal process to procure satisfaction of substantially civil claims is proper

with the leave of the Court. But there are other instances which cannot be compounded or arranged between the parties. If the offence [is] compoundable and [can] be settled in or out of Court without the leave of the Court, there seems no reason why [a compromise] should be regarded as forbidden by law or as against public policy, the policy of the criminal procedure being to allow such a compromise in such cases" (q). Thus where A agreed to execute a kabala of certain lands in favour of B in consideration of B abstaining from taking criminal proceedings against A with respect to an offence of simple assault which is compoundable, it was held that the contract was not against public policy and that the same could be enforced (r). So a promise to pay a sum of money as compensation for the abduction of a woman is enforceable, provided the abduction does not constitute a non-compoundable offence (s). Likewise, money paid to compromise a charge of adultery may be recovered back if the party to whom the money is paid proceeds with the prosecution of the charge, adultery being a compoundable offence (t). But where the offence is non-compoundable, as where the charge is one of criminal breach of trust and the offence is compounded by the accused passing a bond to the complainant, the latter cannot recover the amount of the bond (u). And, further, if the accused was induced to pay money to the complainant in order that a criminal prosecution for an offence which was not compoundable should not be proceeded with, the accused is entitled to recover back the money as money paid under "coercion" within the meaning of s 72 below. In such a case the parties cannot be said to be *in pari delicto* (v). But if there is no evidence of pressure or coercion, the money cannot be recovered back because in such a case the parties will be deemed to be *in pari delicto* (w). In a Madras case, where the

(q) *Per Cur Am r Khan v Amir Jan* (1898) 3 C W N 5 followed *Ahmed Hassan v Hassan Mahomed* (1928) 52 Bom 693 112 I C 459 A I R 1928 Bom 303

(r) *Ib id*

(s) *Shah Fakhran v Ismail Khan* (1904) Punj Rec no 82

(t) *Hossein Shah v Nur Ahmed* (1873) Punj Rec no 81

(u) *Majbar v Syed Multashel* (1910) 40 Cal 113 *Mottai v Thanappa*

(1914) 37 Mad 383 *Ghulam Mohiy ud Din v Deoli Vard* (1914) Punj Rec no 39 p 133 *Ahmed Hassan v Hassan Mahomed* (1928) 52 Bom 693 112 I C 459, A I R 1928 Bom 303

(v) *Muthuveerappa v Ramaswami* (1917) 40 Mad 285, 34 I C 401

(w) *Amjadunnessa Bibi v Fakim Bulsh* (1915) 42 Cal 286 28 I C 713, *Bindeshari Prasad v Leharaj Sahu* (1916) 11 at L J 48 60 61 33 I C 711

and the institution of the suit, [A] more than once affirmed the transaction . . . Apart from the untrue recital in the sale deed there seems to be no flaw in the transaction Without assistance [A] could not have prosecuted his claim There was nothing extortionate or unreasonable in the terms of the bargain There was no gambling in litigation There was nothing contrary to public policy Their Lordships agree with the judgment of the Court of the Judicial Commissioner that the transaction was a present transfer by [A] of one moiety of his interest in the estate, giving a good title to [R] on which it was competent for him to sue" (b) In *Raja Rai Bhagiat Dayal Singh v Debi Dayal Sahu* (c), which is the latest Privy Council case on the subject, a Hindu widow sold to one X certain properties which she had inherited from her son The sale, it was alleged, was without legal necessity On the death of the widow the reversioners who were refused possession by X executed a sale deed in favour of one R by which they purported to sell their rights in the properties, which were worth Rs 3,00,000, to R for Rs 52,600, of which, however, only Rs 600 was paid down, the balance being left on deposit with R "on this condition, that the vendors should get the whole of the consideration in case the whole of the property should be recovered, and, in the event of recovery of a portion of the property sold, a portion of the consideration money in proportion thereto" In a suit by R against X for possession of the property, it was held by the High Court of Calcutta that the sale was void as being champertous, that no title passed to R, and that he was not therefore entitled to maintain the suit (d) On appeal it was held by the Judicial Committee that though the agreement was of a generally champertous character, it was not void on that account, nor was it opposed to public policy and void by reason of the stipulation relating to the payment of the consideration As to X's contention that the assignment by the reversioners to R. was unfair and unconscionable, it was held that, X not being a party to the assignment, it was not open to him to question the transaction on that ground In the course of the judgment their Lordships said "For the respondents it was boldly argued that, although the English law as to maintenance and champerty is not, as such, applicable to India, yet on other grounds

(b) *Achal Ram v Karim Hussain Khan* I A 48

(1905) 27 All 271 I. R. 32 I A 113

(d) See *Debi Dayal Sahu v. Thakurani*

(c) (1908) 35 Cal 420 I. R. 35 *Idhar Partip* (1903) 8 C W N. 408

what is substantially the same law is there in force Their Lordships are of opinion that that proposition cannot be supported In three cases, *Ram Coomar Coondoo v Chunder Canto Mookerjee* (e) *Hunnicar Ram Lal v Nil Kanth* (f) *Lal Ichal Ram v Raja Karim Husain Khan* (g) before this Board a contrary doctrine has been laid down In the last of those cases full effect was given, under circumstances closely analogous to those of the present case to an agreement which certainly would have been void if champerty avoided transactions in India It was further argued that the transaction in question was contrary to public policy and void on that ground, by reason of the provision as to payment of the purchase money by the first appellant to the second and third The purchase money was fixed at Rs 52 600, of which Rs 600 was to be paid down and the balance when the property should be recovered Their Lordships are unable to agree to this argument In their opinion the condition so introduced does not carry the case any further than does the champertous character of the transaction generally It was further said, and this was relied upon in the Courts of India, that the transaction was an unfair and unconscionable bargain for an inadequate price But that is a question between assignor and assignee It is unnecessary to consider what the decision ought to have been if this had been a litigation between the assignors and the assignee in which the former sought to repudiate the assignment In the present case the assignors do nothing of the kind They maintain the transaction and ask that effect be given to it and for that purpose they join as plaintiffs in the present action Their Lordships are therefore of opinion that the attack upon the title of the first appellant upon any such grounds as those indicated must fail "

Agreements between legal practitioners subject to the Legal Practitioners Act 1879 and their clients making the remuneration of the legal practitioner dependent to any extent whatever on the result of the case in which he is retained are illegal as being opposed to public policy (h)

4 Interference with course of justice —It needs no authority to show that any agreement for the purpose or to the effect of using improper influence of any kind with judges or officers of justice is

(e) (1876) 7 Cal 233 L R 4 I A 23 113 9 C W N 477

(f) (1893) L R 20 I A 112

(h) *Ganga Ram v Dett Das* (1907)

(g) (1900) 27 All 271 I R 32 I A Punj Rec no 61

it has been held by the High Court of Madras that a marriage brokerage agreement being unlawful, a plaintiff who has paid money in advance is entitled to recover it back from the defendant though he himself may have broken the contract by refusing to give the bride in marriage (i) There is absolutely no doubt that if any present of ornaments has been made by the father or the guardian of the bridegroom to the bride, the same could be recovered by the former if the father of the bride, in breach of the contract, gives away the girl in marriage to another (ii)

The Madras High Court holds that there is no distinction in principle between an agreement between A and B that B's daughter shall marry A's son on payment of a sum of money by A. to B and an agreement between A and B that B's daughter shall marry A's son and that, if she fails to do so, B shall pay a sum of money to A. In such case B has a pecuniary interest in bringing about the marriage. In the one case, if the event takes place, he receives money. In the other case, if the event does not take place, he has to pay money. If the former agreement is void as being contrary to public policy as held in the Full Bench case cited above, the latter agreement, it was held, is equally so (x)

The Punjab Chief Court holds that a family arrangement of inter marriages of sons and daughters of various families known as *bil mawaza* amongst persons of the same class, by which the family A gives a girl to be taken as a wife on equal terms into a family B, and a girl of the family B is at the same time given as a wife into family A, stands on a totally different footing from what is really a sale of the girl, and is not therefore void as opposed to public policy. Where a girl, therefore, of family A is given as a wife in family B in virtue of such an arrangement, but family B refuses to give a boy of the family as a husband in family A, a suit will lie for damages for breach of the contract. But since such arrangements are not held in very high repute, the Court will not award heavy damages (y)

A I R 1928 Nag 83, see contra *Girdhari Singh v Neeladhar Singh* (1912) 10 All L J 159

(i) *Srinivasa v Sesha* (1918) 41 Mad 197, 41 I C 783

(ii) *Pambhat v Timmayya* (1922) 16 Bom 673, *Girdhari Singh v Neeladhar Singh* (1912) 10 All L J 159. I I C 1001. But if the proposed

in fact solemnised and gifts of this kind made over, they cannot be recovered back. *Pam Sumran Prasad v Girdhari Das* (1926) 5 Pat 646. 29 I C 782, A I R 1926 Pat 242

(x) *Devarajyan v The Aramian* (1914) 37 Mad 373, 18 I C 11

(y) *Am v ...* (1913) 17 I C 1001

There is absolutely no doubt that where the agreement is by a person to pay money to a stranger hired to procure a wife for him, it is opposed to public policy and will not be enforced by any of the Indian Courts (2). An agreement by A to pay money to B if B induces his daughter to take A in adoption is as much against public policy as a marriage brokerage contract, and B is not entitled to recover on the agreement (a).

**6 Agreements tending to create interest against duty.**—One of the reasons suggested for not enforcing agreements to reward parents for giving their children in marriage is that such agreements tend to a conflict of interest with duty. The same principle is applied by the common law to dealings of agents and other persons in similar fiduciary positions with third persons. An agent must not deal in the matter of the agency on his own account without his principal's knowledge. In the present Act the rules on this head are embodied in the chapter on Agency (b), and will accordingly be considered in that place. Certain rules which we shall find in the chapter on Indemnity and Guarantee (c) rest on similar grounds of equity. There are conflicting opinions as to the legality of an agreement by a Patwari or Kanungo in Government service for the purchase of land situated within his circle or for the acquisition of any other interest therein. Allahabad decisions that such an agreement created an interest which would conflict with his duty (d) have been overruled by the Bench of the same Court (e), but the Lahore High Court does not follow this, at any rate as to agricultural land (f). If a person enters into an agreement with a public servant which to his knowledge might cast upon the public servant obligations inconsistent with public duty, the agreement is void (g).

( ) *Isaiahyanathan v Gungara u* (1893) 17 Mad 9, *Pisamber v Jagjivan* (1884) 13 Bom 131

(a) *Kothanda v Thesu Reddiar* (1914) 27 Mad L J 416

(b) Ss 215, 216

(c) Ss 133, 137

(d) *Shiam Lal v Chhal Lal* (1900) 22 All 220, *Sheo Narain v Mata Prasad* (1904) 27 All 73, 1 A L J 412

(e) *Bhagwan Das v Murari Lal* (1917) 30 All 51, 36 I C 59, 14 A L J 962

[1 B] *Kamala Devi v Gur Dayal* (1917) 39 All 58, 36 I C 319, 14 A L J 969

(f) *Abdul Fakhan v Ghulam Muham* (1926) 7 Lah 463, 98 I C 673, A I R 1927 Lah 18

(g) *Sitarampur Coal Co., Ltd v Colley* (1908) 13 C W N 59. It is not easy to see what the party's knowledge has to do with it. The rule is for the protection of the public interest.

7. Sale of public offices.—Traffic by way of sale in public offices and appointments obviously tends to the prejudice of the public service by interfering with the selection of the best qualified persons, and such sales are forbidden in England by various statutes said to be in affirmance of the common law (h) There are no recent English authorities The cases in India on this branch of the subject have arisen principally in connection with religious offices The sale of the office of a *sebat* has been held invalid by the High Court of Madras (i) The High Court of Bombay, while affirming the invalidity of an alienation of the office to a stranger, upholds an alienation made in favour of a member of the founder's family standing in the line of succession (j) Similarly the office of *mutali* of a *wakf* is not transferable (k), nor land which is the emolument of a religious office (l) A custom allowing the sale of the office of *uraller* (trustee) of a Hindu temple for the pecuniary advantage of the trustee, even if it was established, would be bad in law (m) These decisions are based upon the principle that the interest of the public might suffer if bargains relating to public offices are upheld, as their effect is to prevent such offices being filled by the best available persons Where, however, the claimants to the office of *ojha* (high priest) of the temple of Baidyanath were members of a family group, and one claimed the office on the ground that it was elective, and the other that it was hereditary, the High Court of Calcutta held that a compromise by which one of the claimants relinquished his claim in favour of the other in consideration of an annual payment out of the *ekharao* offerings to the idol was not against public policy (n) [See Transfer of Property Act, 1882, s 6 (f) ]

An agreement to pay money to a public servant to induce him to retire and thus make way for the appointment of the promisor is

(h) See Pollock, Contract, 396 The statute 49 Geo III c 126 s 3, is still in force in the Presidency towns

(i) *Narasimma v Anantha Ithappa* (1881) 4 Mad 391, *Kulpa Gurukul v Dora Sami* (1882) 6 Mal 76 See also *Lajath Lurmah Ialia v Lari Lurmah Aunhi* (1876) 1 Mad 235, L P 4 I A 76, *Gnanasambanda Pandara Sannadhi v. Iedu Pandaram* (1900) 23 Mad 271, L R 27 I A 69

(j) *Muncharam v. Prasad* (1852)

6 Bom 238

(k) *Wahid Ali v. Ischruff Hassan* (1882) 8 Cal 732

(l) *Inginepala v. Sri Venkayapa Iyer* (1922) 45 Mal 620 70 I C 461

(m) *Lajath Lurmah Ialia v. Lari Lurmah Aunhi* (1876) 1 Mad 235 The proper name of the office seems to be *urulam* (Wilson & Glosary)

(n) *Gurayya v. Subbaraya* (1882) 3 Cal 615

virtually a trafficking with reference to an office, and is void under this section. In the language of the English law, such an agreement is an office brokerage agreement invalid as opposed to public policy (o) (see illustration (f) to the section, p 114, above). Where money is paid under such an agreement, it cannot be recovered back from the defendant, though he has failed to carry out his promise to procure employment for the plaintiff in public service (p).

**8 Agreements tending to create monopolies**—Agreements having for their object the creation of monopolies are void as opposed to public policy (q).

**9 Agreement by client to remunerate his pleader's clerk**—An agreement by which a litigant binds himself to pay a sum of money to his pleader's clerk for giving special attention to his legal business which the pleader is bound to see to in consideration of his fee is opposed to public policy, and consequently cannot be enforced (r).

**10 Agreement not to bid**—An agreement between persons not to bid against one another at an auction sale is not necessarily unlawful (s).

**Waiver of illegality.**—Agreements which seek to waive an illegality are void on grounds of public policy (t). "Whenever an illegality appears, whether from the evidence given by one side or the other, the disclosure is fatal to the case. A stipulation of the strongest form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches, it destroys" (u).

**Pleadings**—The facts showing illegality must be pleaded, but when the illegality appears from the plaintiff's own evidence, or is

(o) *Saminatha v Muthusami* (1907) 30 41 Mad 471 4 L J C 911  
Mad 530

(p) *Ledu v Hirulal* (1916) 43 Cal 116, 29 I C 625. See this case commented on in *Srinivasa v Sesha Ayyar* (1918) 41 Mad 197, at pp 200 202, 41 I C 783

(q) *Sonu Pillai v The Municipal Council, Mayavaram* (1900) 28 Mad 520, *Mackenzie v Rameshwar Singh* (1916) 1 Pat L J 37, 34 I C 754 (a case which ought not to have been reported at all), *Dev Dayal v Aaram Singh* (1927) 100 I C 559

(r) *Suryanarayana v Subbayya* (1917)

(s) *Mahomed Meera v Sairasi Vayya* (1900) 23 Mad 227, L R 27 I A 17, *Hari v Aaro* (1894) 18 Bom 342, *Doorga Singh v Sheo Pershad* (1889) 16 Cal 194, 199, *Vaung Sein Htin v Chee Pan Agaw* (1925) 3 Ran 275 92 I C 270, A 1 R 1925 Rang 275

(t) *Dhanukdhari v Aathima* (1907) 11 C W N 848, *La Banque v La Banque* (1897) 13 App Ca 111

(u) Per Field J (Supreme Court, U S), in *Oscanyan v Arms Co*, 103 U S, 261, *Hall v Capell*, 7 Wallace, 512

4 otherwise duly brought to the notice of the Court, it is the duty of the Court to give effect to the fact thus brought to its notice, and to give judgment for the defendant, although the illegality is not raised by the pleadings (2) See Code of Civil Procedure, O 6, r 8, and O 8, r 2

**Other statutory provisions of similar effect :** 1 *Trusts Act*—The provisions of this section as to agreements are strengthened or supplemented by some other enactments The Indian Trusts Act II of 1882 provides by s 3 that all expressions used therein, and defined in the Contract Act shall be deemed to have the meanings respectively attributed to them by the Contract Act Sec 4 provides that a trust may be created for any lawful purpose, and that the purpose of a trust is lawful unless it is (a) forbidden by law or (b) is of such a nature that if permitted, it would defeat the provisions of any law, or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy The section further enacts that every trust of which the purpose is unlawful is void

2 *Transfer of Property Act IV of 1882*—Sec 6 (h) of this Act provides that no transfer can be made of property of any kind for an illegal purpose "

3 *Indian Evidence Act I of 1872*—Where the consideration or object of an agreement is alleged to be unlawful, oral evidence may be adduced to prove the same though the agreement is reduced to the form of a document (s 92, proviso (1) )

1 *Specific Relief Act I of 1877*—As to judicial rescission under s 35 (b), see the special commentary on that section

### *Void Agreements.*

24.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void

Agreements void if considerations and objects unlawful in part

#### *Illustration*

A promises to superintend on behalf of B, a legal manufacture of indigo an illegal traffic in other articles B promises to pay to A a salary of 10 000 rupees a year The agreement is void the object of A's promise and the consideration for B's promise being in part unlawful

**Entire or divisible agreements**—This section is an obvious consequence of the general principle of s 23. A promise made for an unlawful consideration cannot be enforced and there is not any promise for a lawful consideration if there is anything illegal in a consideration which must be taken as a whole. On the other hand it is well settled that if several distinct promises are made for one and the same lawful consideration and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The test is whether a distinct consideration which is wholly lawful can be found for the promise called in question. The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void but where you can sever them whether the illegality be created by statute or by the common law you may reject the bad part and retain the good. (w) Further specific reference to English cases where the rule has been recognised would be of no practical use for Indian purposes.

In Bengal an agreement between a zamindar and his tenant for the payment of an enhanced rent which exceeds the rent previously paid by the tenant by more than two annas in the rupee has been held void (x) as it directly contravenes the provisions of the Bengal Tenancy Act VIII of 1865. The Court will not in such a case sever the good part from the bad and pass a decree for the good part that is for so much of the enhanced rent as does not exceed the two annas in the rupee (y). To do so would be to create a new agreement between the parties. An agreement with a pleader to pay a fee of Rs. 500 if he wins the suit and also to transfer to him part of the property in dispute is not severable and is wholly void (z). Similarly where a part of a consideration for an agreement was the withdrawal of a pending criminal charge of trespass and theft it was held that the whole agreement was void (a). Upon the same principle a suit will not lie upon a promissory note for an amount which included an item in respect of lotteries pro-

(w) *Willes J in Pickering v Ilfracombe Ry Co* (1868) L R 3 C P at p 950

(x) *Kristodhone Ghose v Brojo Gobindo Roy* (1897) 2 Cal 895

(y) *Cting Pickering v Ilfracombe Ry Co* L R 3 C P 235 950 and *Baker v Hedgcock* 39 Ch D 590

(z) *Kall v Ja n G jar v Islwanath*

*Ganesh Ja adelar* (1900) 49 Bom 619 89 I C 199

(a) *Srirangachariar v Ramasami Iyyangar* (1894) 18 Mad 189 *Bnde shari Pra ad v Lekhraj Sahu* (1916) 1 Pat L J 48 60 33 I C 711 *Bani Ramchandra v Jayawant* (1918) 49 Bom 339 40 I C 566

hibited by law (b) or an amount in respect of gambling losses (c) Where A promised to pay Rs 50 per month to a married woman B, in consideration of B living in adultery with A and acting as his house keeper, it was held that the whole agreement was void and B could not recover anything even for services rendered to A as house keeper (d) Where, in consideration of A agreeing to procure a divorce from her husband and marrying B, B advanced to A Rs 300 of which part was alleged by B to have been paid for expenses of procuring the divorce and part for A's ornaments it was held that on A's failure to perform the contract B was not entitled to recover from A any part of the money advanced (e) Similarly, a suit will not lie to recover money advanced as capital for the purposes of a partnership which is partly illegal A holds a licence for the sale of opium and *ganja* The *ganja* licence contains a condition prohibiting A from admitting partners into the *ganja* business without the permission of the Collector No such condition is embodied in the opium licence B who is aware of the prohibition, enters into a partnership agreement with A both in the opium and *ganja* business without the leave of the Collector and pays A Rs 500 as his share of the capital Disputes arise between A and B, and B sues A for dissolution of partnership and for a refund of his Rs 500 B is not entitled to recover Rs 500 or any part thereof one of the objects of the agreement being to carry on *ganja* business in partnership In such a case 'it is impossible to separate the contract or to say how much capital was advanced for the opium and how much for the *ganja*' (f) A stands bail for B who is charged with an offence and as an indemnity for the bail takes from B a sale deed of B's house and also a rent note whereby B agrees thenceforward to occupy the house as A's tenant and to pay rent to him A cannot sue B on the rent note 'The sale deed and the rent note are part and parcel of the same transaction and the rent note is tainted with the same illegality which affects the sale deed' (g) Different consequences however, may follow when a part of the consideration

(b) *Joseph v Solano* (1872) 9 B I R 441

(c) *Eskobind v Bhagpu Mal* (1917) 35 All 558 21 I C 878

(d) *Alce Mary Hill v William Clarke* — 27 All 266

*Muhammad Ishaq v Muhammad*

(1887) Lunj Rec no 46 *Ishaq v Vanu Nagar* (1885) 10 Bom Lc

(f) *Gopalrao v Kalappa* (1901) 3 Bom I R 164

(g) *Larmann v Abdul Kader* (1904) 3 Bom 410

or "object" of an agreement is not illegal, but merely void in the sense that it is not enforceable in law. In such a case actual performance of such part may be a good consideration, though a promise to perform it would not have been. Thus a bond passed by a judgment debtor to the holder of a decree against him in consideration of the latter refraining from execution of the decree is void under s 257A of the Civil Procedure Code, 1882, but not illegal. The decree holder, therefore, on performing his part of the agreement, was held entitled to recover on the executed consideration (*h*), being in itself a voluntary lawful forbearance, though not upon the executory agreement. If the promise to postpone execution of the decree were illegal the whole bond would be tainted with illegality, and the judgment creditor would then have no right to enforce payment of the bond. But when the parties themselves treat debts void as well as valid as a lump sum, the Court will regard the contract as an integral one, and wholly void. Thus where a judgment debtor agreed to pay in a lump sum interest not awarded by a decree in addition to the sum decreed without the sanction of the Court it was held that, the promise to pay such interest being void under s 257A of the Civil Procedure Code, 1882, the whole agreement was void (*i*). Sec 24 has been applied to the case of a usufructuary mortgage under which the mortgagee took the rents and profits in discharge of interest. The mortgage was illegal under the Agra Tenancy Act, but the Court refused to enforce the personal covenant (*j*). It is not clear, however, why the legal personal covenant was not separable from the illegal security.

The provisions of this section must be distinguished from those of s 57 below. In a Bengal case a Mahomedan husband agreed by a registered document that he would pay over to his wife whatever money he might earn, and that he would do nothing without her permission, and that if he did so she would be at liberty to divorce him. In a suit by the wife to recover from him his earnings it was held that though the latter part of the agreement might be unlawful, the suit was one to enforce the legal part, and the Court gave a decree to the plaintiff.

(*h*) *Bank of Bengal v Lyabkoy Gangji* (1891) 16 Bom 618

(*i*) *Darlatasing v Pandu* (1884) 9 Bom 176. Sec 257A has been omitted in the Code of 1908

(*j*) *Har Prasad Tiwari v Sheo Gobind Tiwari* (1922) I L R 44 All 486, 67 I C 793, 29 A L J. 318. *Contra Gauri Datt v Bandhu Pandey* (1929) 119 I C 605, A I R 1929 All 394

throughout the Act, and seems to be involved in the definitions of "agreement" and "reciprocal promises" in s 2, sub ss (c) and (f) (see the commentary thereon, p 32, above) (p)

The most obvious example of an agreement without consideration is a purely gratuitous promise given and accepted. Such a promise has no legal force unless it comes within the first class mentioned in the present section. But there are other less obvious cases, and they must be all the more carefully noted because neither the text nor the illustrations of this section throw any light on them. It is not enough that something whether act or promise appears on the face of the transaction, to be given in exchange for the promise. That which is given need not be of any particular value: it need not be in appearance or in fact of approximately equal value with the promise for which it is exchanged (see commentary on explanation 2 below), but it must be something which the law can regard as having some value so that the giving of it effects a real though it may be a very small change in the promisee's position: and this is what English writers mean when they speak of consideration as good, sufficient or valuable. An apparent consideration which has no legal value is no consideration at all. A performance or promise of this kind is sometimes called an 'unreal consideration'.

**Forbearance and compromise as consideration**—Compromise is a very common transaction and so is agreement to forbear prosecuting a claim or actual forbearance at the other party's request for a definite or for a reasonable time. It may seem at first sight that in all these cases the validity of the promise is doubtful. For the giving up or forbearing to exercise, an actually existing and enforceable right is certainly a good consideration (q), but what if the claim is not well founded? Can a cause of action to which there is a complete defence be of any value in the eye of the law? If a man bargains for reward in consideration of his abandonment of such a cause of action does he not really get something for nothing even if he believes he has a good case? The answer is that abstaining or promising to abstain from

(p) This section itself has been observed to be exhaustive. *Indran Jambhavan v Anthappa Chetti* (1906) 16 M L J 4 at p 420. This means we presume that an agreement may be without consideration

whether it be real or not. It is not an essential part of the consideration that it be real or not. It is sufficient that it be something of value in the eyes of the law.

(q) *Jayaram v. Jayaram Chetti & Co.* (1910) 31 Cal 24

doing anything which one would otherwise be lawfully free to do or not to do is a good consideration, and every man who honestly thinks he has a claim deserving to be examined (r) is free to bring it before the proper Court, and have the judgment of the Court on its merits, without which judgment it cannot be certainly known whether the claim is well founded or not, for the maxim that every man is presumed to know the law, not a very safe one at best, is clearly inapplicable here. That which is abandoned or suspended in a compromise is not the ultimate right or claim of the party, but his right of having the assistance of the Court to determine and, if admitted or held good, to enforce it. "If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating to be able to litigate his claim, even if he turns out to be wrong" (s). Forbearance to sue for or demand a merely honorary or customary debt may be a good consideration (t). But the abandonment of an obviously groundless claim will not make a good consideration "any more than a promise to pay a sovereign in satisfaction of a debt of a guinea is supportable by the consideration that it saves the creditor the trouble of bringing an undefended action for the larger sum" (u).

The principle thus stated is followed by the Indian Courts (v).

(r) He need not have a positive opinion that it is justified for its success may depend on facts not within his own knowledge or on unsettled questions of law or both. Oftentimes a man who is asked "Is your cause just?" may quite fairly answer "I see nothing against good conscience in it whether it is good in law is exactly what I want the Court to tell me. These refinements however are perhaps fitter for the moralist than for the lawyer."

(s) Bowen L.J. in *Miles v New Zealand Alford Estate Co* (1886) 32 Ch Div 266 291. Cp *Walby v Elgee* (1875) L.R. 10 C.P. 497.

(t) *Goodson v Grierson* [1908] 1 K.B. 761 C.A. Even a gaming debt which for some purposes would itself be an

illegal consideration under the English Gaming Acts. *Hjans v Stuart King* [1908] 2 K.B. 696 C.A.

(u) *Jagatcera Rana Ettappa v Iru mugam* (1918) L.R. 45 I.A. 190 193 48 I.C. 907 (the real question was whether a contract to pay enhanced rent for tenant's improvements could be implied under a Madras Act in fact there was no forbearance or promise thereof). See also *Rallu v Phalla* (1919) P.R. 137 53 I.C. 497. *Gopal Sahai Bickha Lal v Dhanu Ram Ram Gopal* (1929) 118 I.C. 646 A.I.R. 1929 Lah. 689.

(v) *Olavi Pulliah Chetti v Varada rajulu* (1908) 31 Mad. 474 at pp. 476 477. *Krishna Chandra v Hemaya Sankar* (1917) 22 C.W.N. 463, 45 I.C. 477 [where the claim was not *bona fide*].

Thus where after the expiration of the time fixed for completion of a mortgage the mortgagee declined to advance the money unless the mortgagor consented to pay interest from the date fixed for the completion, and the mortgagor agreed to do so, it was held that there was a good consideration for the agreement, though time was probably not of the essence of the original contract. The mortgagee believed in good faith that he was entitled to rescind at once, and the abandonment of his claim to do so was consideration enough for the mortgagor's agreement to his terms (w). An agreement in the nature of a compromise of a *bona fide* dispute as to the right of succession to a priestly office is not without consideration (x), nor is a mutual agreement to avoid further litigation invalid on this ground (y), nor a family arrangement providing for the marriage expenses of female members of a joint Hindu family on a partition between them of the joint family property (z), nor a promissory note in the nature of a compromise of a doubtful litigation passed by a tenant to the zamindar during the pendency of a suit brought by the zamindar against the tenant to eject him from his holding (a). But a pledge or promise of security for an existing debt is void unless there is some forbearance or undertaking by the creditor (such as not pressing for payment or accepting a reduced rate of interest) in return for it. Thus where the drawer of a *hundi* became insolvent before it fell due and the plaintiff who was the holder, in due course applied to the acceptor to give security for payment at maturity, and the latter executed a mortgage "by way of collateral security bond," it was held that, the plaintiff not having entered into any undertaking whatever he could not recover on the mortgage deed (b).

**Promise to perform existing duty.**—It is well settled in England that the performance of what one is already bound to do either by

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| (w) <i>Dalabhoj v. Pestonji</i> (1893) 17 Bom 457. The plaintiff's right was really, it seems to give the defendant notice that he would rescind if the defendant did not complete within a reasonable time see 17 Bom at p. 460. | property <i>Sunder Singh v. Haro</i> (1899) 111 I C 71.  |
| (x) <i>Girijanund v. Subhyanund</i> (1896) 23 Cal 615 667 668. <i>Jameshwar Ironworks v. Jachma Ironworks</i> (1904) 31 Cal 111 131—132. <i>Jharna Mahadev v. Shrinanum Mahadev</i> (1899) 14 Com I 1 40 41. Similarly as to      | (y) <i>Dhoke v. Vengalgar</i> (1898) B H C 5 C 170.<br>(z) <i>Anant Narayan v. Sathya</i> (1912) 37 Mad 171. <i>Sahaj v. Jethal Lal</i> (1928) 50 All 281. 107 I C 41. <i>V. V. V.</i> 1928 All 65.<br>(a) <i>Faridpur v. Cope</i> (1914) 14 All I 1 731.<br>(b) <i>Maharaj Lal v. Jethal Lal</i> (1896) 1 All 70. |

general law or by a specific obligation to the other party, is not a good consideration for a promise; for such performance is no legal burden to the promisee, but, on the contrary, relieves him of a duty. Neither is the promise of such performance a consideration, since it adds nothing to the obligation already existing. Moreover, in the case of the duty being imposed by the general law, an agreement to take private reward for doing it would be against public policy. But before applying this rule we must be careful to ascertain that a legal duty does exist. A promise to remunerate a person named as executor (not out of the estate itself) if he accepts the office and performs the duties of executor is not bad for want of consideration, since it is not a legal duty to accept the office (c) and perform those duties without claiming any remuneration. But a person served with a subpoena is legally bound to attend and give evidence in a court of law, and a promise to compensate him for loss of time or other inconvenience is void for want of consideration (d). Similarly an agreement by a client to pay to his vakil after the latter had accepted the *vakalatnama* a certain sum in addition to his fee if the suit was successful is without consideration (e). And it has been held by the High Court of Allahabad that a bond passed by a judgment debtor to the holder of a decree against him for the amount of the decree plus Rs. 3 paid for him for the stamp and registration charges of the bond is without consideration where the decree was made by a Court having no jurisdiction to make it and the bond was passed to secure the release of the debtor from arrest (f).

But if a man, being already under a legal duty to do something, undertakes to do something more than is contained therein or to perform the duty in some one of several admissible ways—in other words, to forgo the choice which the law allows him, this is a good consideration for a promise of special reward (g).

If A is already bound to do a certain thing, not by the general law,

(c) *Narayan v. Shajani* (1854) 22 Cal. 14. It was also argued without success, that the agreement was against public policy as making it the executor's interest to prolong the administration of the estate against his duty.

(d) *Sashannah Chetti v. Ramasamy Chetti* (1868) 4 M. H. C. 7.

(e) *Ramchandra Chintaman v. Kala*

*Paju* (1877) 2 Bom. 362. (v. *Ganoo Panu v. Deri Jais* (1907) Punj. Rec. no. 61.

(f) *Banda Ali v. Banupal Singh* (1882) 4 All. 352.

(g) *England v. Davidson* (1840) 11 A. & F. 856, 52 R. R. 522 (reward to constable for services beyond duty), *Hartley v. Ponsonby* (1857) 7 E. & B. 672, 110 R. R. 667.

but under a contract with Z, it seems plain that neither the performance of it nor a fresh promise thereof without any addition or variation will support a promise by Z, who is already entitled to claim performance. For Z is none the better thereby in point of law, nor A any worse. But what if M, a third person not at present entitled to claim anything, offers a promise to A in consideration of (a) A's performance of his obligation to Z, or (b) A's promise to M to perform that obligation? These questions have given rise to great difference of learned opinion in England and America (h). They do not seem to have been considered by Indian Courts. Such English authority as there is favours the opinion that the performance is a good consideration but the reasons given are not very clear and seem to assume that both performance and promise must be good considerations in such a case or neither (i). It is submitted however that on principle this assumption is not tenable. The test is whether there is any legal detriment to A, the supposed promisee. Now A's performance of what he already owes to Z is no detriment to him as has been pointed out and indeed the resulting discharge of his liability seems rather to be an advantage, and therefore it is no consideration for a new promise by any one. But A's promise to M to do something though he may have already promised Z to do that same thing is the undertaking of a new obligation to a new party. There is no reason why it should not be made binding by M's counter promise as in any other case of a contract by reciprocal promises unless the law forbids the same performance to operate in discharge of two distinct contracts. There is no positive authority for any such rule of law, and when we bear in mind that in a contract by reciprocal promises the promises are the consideration for each other and not the performance no such rule appears to be demanded or warranted by principle.

Whatever resolution of the speculative question may ultimately prevail, the difficulty may be removed in the case of performance by the slightest appreciable addition to the performance already contracted for, and in the case of promise by A's new undertaking to M being

(h) See Collock on Contract 9th ed 190—9. Anson 17th ed 104—107. J Q B xx 9. Harv Law J cv xvii 71. Locke 17th ed 477 478.

(i) *Shadwell v Shadwell* (1860) 9 C B N S 151. 127 R R 604. But

q are whether there was in fact a r intention to create a legal relation at all (see the discussion further of *Dillon v Banton* 13 C B N S 177 (1846) C H & N 27. 133 R R 164. 111 R

or including an undertaking not to rescind or vary, without M.'s consent his existing contract with Z

**Transfer of immovable property.**—This section has been held to apply to cases of sale and mortgage of immovable property. Thus in *Manna Lal v Bank of Bengal* (j) the Allahabad High Court held a mortgage effected by a duly registered deed to be void for want of consideration under r this section. Similarly in *Tatia v Babaji* (k) Fulton J held that a sale effected by a duly registered deed under which the purchaser had entered into possession was void for want of consideration under this section. Farran C J, however was inclined to the opinion that conveyances of land in the Mufassal perfected by possession or registration where the consideration expressed in the conveyance to have been paid had not in fact been paid could not be put in the same category as agreements void for want of consideration (l). The first of these two cases was decided before the Transfer of Property Act IV of 1882 was enacted. As regards the other case that Act was not yet extended to the Bombay Presidency when the deed of sale was executed. It would seem however that the result would be the same under s 51 of that Act read with s 1. The latter section declares that the chapters and sections relating to contracts in that Act shall be taken as part of the Contract Act.

**Negotiable Instruments**—The law merchant has almost—but as it is held by something very near a fiction not quite—made an exception to the rule of consideration in the case of negotiable instruments or rather established another and independent rule. The Negotiable Instruments Act XXVI of 1881 s 118 affirming the well settled general law enacts that until the contrary is proved the presumption shall be made that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted endorsed, negotiated or transferred, was accepted endorsed negotiated, or transferred for consideration. The second branch of the above rule stands as illustration (c) to s 114 of the Evidence Act I of 1872.

We now come to the exceptional cases in which consideration is dispensed with

(j) (1876) 1 All 309

(i) 22 Bom at p 183

(k) (1896) 22 Bom 176 181, 182

**Registered writing.**—The English doctrine that the “solemnity of a deed” is of itself sufficient to make a promise expressed in a sealed writing valid has never been received in British India (m) The Act does not allow any form alone to dispense with consideration, but only writing and registration coupled with the motive of natural love and affection between nearly related parties The words “near relation” have not been judicially construed The Courts would, it need hardly be said, have to construe them uniformly without regard to variations in the reckoning of degrees of kindred, for the purposes of inheritance or the like, in different personal laws or customs (n) A registered agreement between a Mahomedan husband and his wife to pay his earnings to her is within the provisions of cl. 1 of the section (o) So is a registered agreement whereby A on account of natural love and affection for his brother, B undertakes to discharge a debt due by B to C In such a case, if A does not discharge the debt, B may discharge it, and sue A to recover the amount (p) But an agreement in writing and registered, whereby a member of an undivided Hindu family, without any valuable consideration, renounces all right to the family property in favour of the remaining coparceners is void unless it is executed for natural love and affection (q) It is not to be supposed that the nearness of relationship necessarily imports natural love and affection Thus where a Hindu husband executed a registered document in favour of his wife whereby, after referring to quarrels and disagreement between the parties the husband agreed to pay her for a separate residence and maintenance and there was no consideration

(m) *Kaliprasad Tewari v Raja Sahib Pralad Sen* (1869) 2 B L R (P C) at p. 122 In England the formal operation of a deed is much older than the doctrine of consideration It is therefore erroneous to say, as text books commonly did at one time, that the formality ‘imports a consideration’ On the contrary, the doctrine of consideration was introduced only when informal contracts were made actionable by a series of ingenious fictions, but this is not material for Indian purposes

(n) *Jafar Ali v Ahmed Ali* (1868) 5 B H C, A C J 37 where it was held

before the Act, that the relation of cousins would not support a voluntary agreement, though registered there was no light on the possible construction of the Act, for by the Common Law, which the Court apparently followed, every degree of kinship however near, would suffice

(o) *Poonoo Bibot v Eyz Bulah* (1874) 15 B L R App 5

(p) *Venkataramy v Jagannamy* (1903) 13 Mad L J 428

(q) *Appa Pillai v Idappu Pillai* (1902) 6 Mad 71 The facts of the case did not show that the agreement was made on account of natural love and affection

moving from the wife (r), it was held in a suit by the wife brought on the agreement that the agreement was void as being made without consideration. It was further held that the agreement could not be said to have been made on account of natural love and affection, the recitals in the agreement being opposed to that view (s). It is difficult to reconcile with the last case the decision of the Bombay High Court in *Bhuva Mahadshet v Shuraram Mahadshet* (t). In that case A sued his brother B upon a registered instrument whereby B had agreed to give A one half of certain property. It appeared that A had previously sued B to recover that share from him, alleging that the property was ancestral, but the suit was dismissed on B taking a special oath that the property was not ancestral. It further appeared on the plaintiff's own admissions that the brothers had long been on bad terms. Upon these facts the Subordinate Judge held that the agreement was void for want of consideration and that it could not be said to have been made on account of natural love and affection so as to come within the first exception to the section, and the decision was affirmed by the District Judge. On appeal the High Court held that the agreement must be held to have been made for natural love and affection and that A was entitled to a decree. The Court said "The District Judge dismissed it (the suit), holding the document void for want of consideration. The Subordinate Judge had held the same. He said 'there was no consideration for the agreement. The defendant voluntarily agreed to give half of the joint property to the plaintiff to secure reconciliation with the plaintiff.' It seems to us however, that this is just the case to which s. 25 (1) of the Contract Act should be held to apply. The defendant had such natural love and affection for his brother that in order to be reconciled to him, he was willing to give him this property. As natural love and affection cannot be inferred as a fact merely because no other motive for the promise is shown, it would seem that the Court presumed it from the relation of

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(r) It would of course, have been different if the facts had disclosed such a state of circumstances as would under the Hindu law, have justified the wife in obtaining a separate residence and maintenance such as violence on the part of the husband which would render it unsafe for the wife to continue to live

with him or such continued ill usage as would be termed cruelty in the English Court. There would then have been ample consideration to support the agreement.

(s) *Rajlukhy Dabee v Bhootnath* (1900) 4 C W N 488

(t) (1899) 1 Bom L R 495

the parties. One would have thought that the presumption, if any, was rebutted by the plaintiff's own admissions. A desire for a reconciliation prompted (as the learned Judge of the High Court thought) by love and affection for the plaintiff is not strongly evinced by the subsequent conduct of the defendant in declining to perform the contract and driving the plaintiff to a suit. But, however this may be, it appears to us anything but safe to hold that a promise by one brother to another, unsupported by any consideration, and made solely with a view to purchase peace, can be enforced in a Court of law on the bare supposition that the object was reconciliation, and that the reconciliation was prompted by natural love and affection.

**Compensation for voluntary services.**—The second sub-section considerably extends the real or supposed exceptions (for their authority is by no means clear) allowed in the Common Law to the principle that past consideration is no consideration at all, since the consideration and the promise have to be simultaneous (u). The language of the Act is quite clear, and must be taken as expressing a deliberate policy, it would therefore be useless to discuss the English rules.

The act voluntarily done must have been done for the promisor (t). If it is done for any other person, the promise does not come within the provisions of this clause (u). In an Allahabad case the defendants by a written agreement promised to pay to the plaintiff a commission on articles sold by them in a market established by the plaintiff at his expense. The market was not established at the desire of the defendants, nor was it erected for them, but this was done at the request of the Collector of the place. The only ground for making the promise

(u) As to the English law see Anson 17th ed. 114 sqq. and *cf.* pp. 167, 168 above.

(t) Not at his request. That case is covered by s. 2 (d) p. 13 above. The enactment now before us appears to cover cases where a person without the knowledge of the promisor or otherwise than at his request does the latter some service, and the promisor undertakes to recompense him for it. *per* Farran C. J. in *Sankar (1881) 2 B. & C.*

75. But possibly there may be no consideration. *Isaiah Kumar Chowdhury v. Madan Mohan Chowdhury* (1918-19) 23 C. W. N. 431 (C. 1918).

(u) The authority of the Hindu family to alienate an estate or joint property for the payment of a debt at any time barred Hindu law is on peculiar principles of Hindu law. See *Cyathar v. Jaganath* (1911) 40 All. 555, 50 I. C. 684.

was the expense incurred by the plaintiff in establishing the *gang*. The Court held that the promise could not be supported under the present sub section (x). Further, the act voluntarily done must have been done for a promisor who was in existence at the time when the act was done. Hence work done by a promoter of a company before its formation cannot be said to have been done for the company (y). Again, the act done must have been done for a promisor who is competent to contract at the time when the act was done. Hence a promise by a person on attaining majority to repay money lent and advanced to him during his minority does not come within the exception, the promisor not being competent to contract when the loan was made to him. It has been so held by the High Courts of Madras and Allahabad (z). A different view has been taken by the High Court of Calcutta (a), and by the Chief Court of the Punjab (b) but it does not appear to be sound law. See notes to s. 11 under the head "Minor's agreement," on p. 68, above. A promise to pay a woman an allowance for past cohabitation has been regarded as an undertaking by the promisor to compensate the promisee for past services voluntarily rendered to him (c), but the correctness of these decisions may be doubted. It is true that in English law past cohabitation though no better in law than any other past consideration, is not an unlawful consideration (d) so as to make a formal instrument void which is in fact given to secure an allowance therefor. But in order to support the Indian decisions just cited it must be held that cohabitation is at the time such a lawful voluntary service as to be a proper subject for com-

(x) *Durga Prasad v Baldeo* (1880) 3 All 221

(y) *Ahmedabad Jubilee S & W Co v Chhotalal* (1908) 10 Bom L R 141 143. So it is well settled in England that a company cannot ratify acts of its promoters done before it was formed.

(z) *Indran Ramaswami v Anthappa Chettiar* (1906) 16 Mad L J 422. *Suraj Varain v Sukhu Ahir* (1928) 51 All 164. 26 All L J 1024, 112 I C 159. A I R 1928 All 440.

(a) *Musammat Kundan Bibi v Sree Narayan* (1907) 11 C W N 135.

(b) *Karm Chand v Bwant Kuar* (1911) 1unj Rec no 31.

(c) *Dhiraj Kuar v Bikanaraj t Singh* (1891) 3 All 787, *Man Kuar v Jasodha Kuar* (1877) 1 All 478, *Lakshminarayana v Subhadra Ammal* (1903) 13 Mad I J 7 13. Our doubt is supported by *Husseinali v Dinbas* (1903) 86 I C 240 243. 25 Bom L R 252. A I R 1924 Bom 135.

(d) *Crey v Matthias* (1800) 5 R R 48. 5 Ves 986. *Beaumont v Reese* (1846) 8 Q B 483. 70 R R 509. It may perhaps be doubted whether the effect given to the present sub section by applying these authorities to it was contemplated by the framers of the Act.

pensation (e) whereas the Bombay High Court now holds the contrary (f)

It is clear that a case cannot come within this exception unless the act has been done voluntarily (g) nor unless there is a promise in the first instance. A clause in a memorandum or articles of association of a company providing for payment to a promoter of the company does not constitute a promise by the company to the promoter. Hence a claim against a company for remuneration by a promoter of the company cannot be supported under this section where such claim is based merely on the provisions of the memorandum and articles of association of the company (h)

**Promise to pay a barred debt.** Sub-s. (3) reproduces modern English law (hh). The reason for unholding these promises was thus stated soon after the Act came into force by Weppell C J (i). The general rule of law no doubt is that a consideration merely moral is not a valuable consideration such as would support a promise (j). But there are some instances of promise which it was formerly usual to refer to the now exploded principle of previous moral obligation and which are still held to be binding although that principle has been rejected. Amongst those instances is a promise after full age to pay a debt contracted during infancy and a promise (in writing) in renewal of a debt barred by the Statute of Limitations. The efficacy of such promises is now referred to the principle that a person may renounce the benefit of a law made for his own protection. Accordingly this exception applies only where the promisor is a person who would be liable for the debt if not time barred and does not cover promises to pay

(e) See on s. 3 (1) the text above. At all events a gratuitous intercourse will not support a subsequent promise of compensation under this clause. See *Mary Hall v. William Clarke* (1905) 22 All 460.

(f) *Amundson v. Dsouza* (1919) 22 Bom 1111; 44 Ind 471; 1 C 472. *Hussain v. Durrani* (1919) Bom 1118; 45 Ind 211; 1 C 133.

(g) *Kalpal v. Dutt v. Durgadas P. Y.* (1905) 22 C W N 70; 23 J C 10. A I R 1927 Cal 677.

(h) *Thornhill v. Fraser & Neave* (1887) 12 Q B 211; 11 L J 419. *Postle v. Cornwall & City Life Insurance Co.* (1887) 1 Ex D 84.

(hh) Where applicable to s. 3 (1) Art 8 of the Limitation Act 1908 (Amended) applies. *Dutta v. Dutt* (1908) 11 C 133; 1 C 133.

(i) *Thornhill v. Fraser & Neave* (1887) 12 Q B 211; 11 L J 419.

(j) *Thornhill v. Fraser & Neave* (1887) 12 Q B 211; 11 L J 419.

time barred debts of third persons (k) To create a "promise" it is not necessary that there should be an accepted proposal reduced to writing All that is necessary is that there should be a written proposal by the promisor accepted before action, for a written proposal becomes a promise when accepted (l)

The distinction between an acknowledgment under s 19 of the Limitation Act and a "promise" within the meaning of this section is of great importance Both an acknowledgment and a promise are required to be in writing signed by the party or his agent authorised in that behalf, and both have the effect of creating a fresh starting point of limitation (m) But while an acknowledgment under the Limitation Act (n) is required to be made before the expiration of the period of limitation, a promise under this section to pay a debt may be made after the limitation period After the period of limitation expires, nothing short of an express promise will provide a fresh period of limitation (o) The question occasionally arises whether a writing relating to a barred debt amounts to an acknowledgment or to a promise Here the Court must consider the language of the particular document before it in every case (p) If it amounts to an acknowledgment the writing could not avail the plaintiff under this section, but it is otherwise where it amounts to a promise Thus *khata*, or an account stated,

(k) *Pestonji v Bai Meherbai* (1928) 30 Bom L R 1407 112 I C 740, A I R 1928 Bom 539 *Asa Ram v Karam Singh* (1929) 119 I C 109, (1929) All L J 901, A I R 1929 All 586 (Hindu son's agreement to pay father's barred debt available only against family property)

(l) *Appa Pao v Suryaprakasa Rao* (1899) 23 Mad 94 97 98

(m) An acknowledgment in writing is not the only mode of creating a fresh starting point of limitation in the case of a debt not barred by limitation An oral agreement to extend the time of payment may effect the same purpose

*Shrinivas v Jaghunath* (1902) 4 Bom I R 50

(n) See *Maniram v Seth Luchand* (1906) 33 I A 165, 172, 33 Cal 1047, 1054 *Maganlal Haryabhas v Amichand Gulabji* (1928) 52 Bom 521,

112 I C 24 A I R 1928 Bom 319 *Isriada Nadan v Vedamuthu Nadan* (1924) 86 I C 917 (so called oral settlement of time barred account)

(o) See *Ganga Prasad v Jais Dayal* (1901) 23 All 502 at p 504 *Ram Bahadur Singh v Damodar Prasad Singh* (1921) 6 Pat L J 121 60 I C 514 *Deoraj Tewari v Indrasen Tewari* (1929) 8 Pat 706, 120 I C 470 A I R 1929 Pat 258, distinction fully explained in *Patna H C*

(p) *Gobind Das v Sarju Das* (1908) 30 All 268 (the terms of the document there considered are not clearly stated but apparently there were no words of promise), *Prakhal Prasad v Bhagwan Das* (1926) 49 All 496, 100 I C 593 Reports giving no particulars e.g. *Hanna Pam v Jhanda Singh* (1930) 129 I C 90, A I R 1929 Lah 591 are useless

has been held to be a mere acknowledgment is distinguished from a promise under this section (g). Similarly a bare statement of an account is not a promise within the meaning of this section (r). In the same way the words *balī devā* (balance due) at the foot of a Gujarati account were held not to amount to a promise (s). Similarly of a *mablaqhandī* in Bengal (t). On the other hand, where a tenant wrote to his landlord in respect of rent barred by limitation, "I shall send by the end of Icy *hak* month" it was held that the words constituted a promise under this section (u). In a Bombay case, a *khata* signed by the defendant ran as follows: "Rs. 200 were found due on the account of the previous *khata* having been made up. For the same this *khata* is passed. The moneys are payable by me. I am to pay the same, whenever you may make a demand." It was held that the *khata* was a promise to pay within the meaning of this section (v).

An agreement between a creditor and a debtor entered into before the expiry of the period of limitation whereby the date of payment is extended beyond the period of limitation is valid though verbal if there is a consideration for the agreement e.g. payment of interest up to the extended date. Such an agreement is not an acknowledgment within the meaning of s. 19 of the Limitation Act nor is it a promise to pay a barred debt: it may be enforced at any time within three years from the date on which it was made (w). 'A promise to pay may be absolute or conditional. If it is absolute if there is no 'but' or 'if' it will support a suit without anything else. If it is conditional

the condition must be performed before a suit upon it can be decreed (x) Thus in *Hatson v Yates* (y) the defendant after his debt had become barred by limitation wrote as follows to his creditor in reply to a demand for payment I would assure you that I bear the matter in mind and will do my utmost to repay the money as soon as I possibly can It was held that this constituted a conditional promise to pay the barred debt the condition being the ability of the defendant to pay The plaintiff in the case failed to show that the defendant was able to pay and it was held that the defendant could not therefore be held bound Similarly if the promise be to pay a barred debt within a month the promise must wait for a month before he can sue on the promise ( ) If the debtor promises to pay a barred debt out of his share of the profits of the business started by him in partnership with his creditor the latter cannot recover the debt except in the manner provided in the agreement (a)

*Agent generally or specially authorised in that behalf*—A Collector as agent to the Court of Wards is not an agent within the meaning of this section to bind a ward of the Court of Wards by a promise to pay a barred debt (b) Nor is a pleader unless he is specially authorised in that behalf (c) Nor a minor's guardian (d)

*Debt*—The expression debt here means an ascertained sum of money A promise therefore to pay the amount that may be found due by an arbitrator on taking accounts between the parties is not a promise to pay a debt within this section (e) The expression debt in this clause includes a judgment debt A promise therefore to pay the amount of a decree barred by limitation does not require any consideration to support it (f)

- (x) *Bndae Dasja v Chota* (191 ) 16 435—437  
C W N 636 at p 638 *Man a n v Seth Rupchand* (1906) 33 I A 165 1 °  
33 Cal 1047 1058 *Ballapragada v Tlan mana* (191 ) 40 Mad 01 35 I C 55
- (y) (1887) 11 Bom 580 See the similar English authorities collected in Leake on Contracts 4th ed 40 or the editorial note to *Tanner v Sma t* (1897) 30 R R 461 6 B & C 603 now revised by the H L in *Spencer v Hemm rde* [190 ] 2 A C 507
- (z) See *Muhammad Abdulla v Bank Instalment Co Ltd* (1903) 3 All 435—437
- (a) *Bndae Dasja v Chota* (191°) 16 C W N 636
- (b) *Surya na ayana v Narendra Thatra* (1895) 19 Mad 555
- (c) *Bans thar v Bab Lal* (19 3) 91 All L J 13 5 I C 309
- (d) *Man Lja Bewa v Pushpa Charan Majh* (19 9) 115 I C 563 A I R 1908 Cal 850
- (e) *Dora sams v Vath l nga* (191°) 40 Mad 31 [F B ]
- (f) *Heera Lall v Dhunput Singh* (1878) 4 Cal 500 *Bil ngi v The Uncore*

It is not necessary to the operation of this clause that the promise should in terms refer to the barred debt. Thus where A passed a promissory note for Rs 325 to B, and, after the debt was time barred, passed another note promising "to pay Rs 325 for value received in cash," it was held that it was open to B to show that the amount, though not paid in cash, referred to the debt due under the first note (g).

An insolvent who has obtained his final discharge is under no legal obligation to pay any debt included therein and any promise to pay it is accordingly without consideration. Such a debt is said to be barred by insolvency, and the Contract Act contains no exception in favour of a promise to pay it (h). It is not clear however whether the same principle would apply to a promise without new consideration to pay a debt in respect of which the insolvent has obtained only his personal and not his final discharge and which is included in the judgment entered up against him in favour of the official assignee. In such a case it will be observed that the creditor's remedy is not strictly speaking barred but is transferred to the official assignee who alone can recover the debt in the manner and subject to the conditions provided by the Insolvent Debtors Act of 1818. In *Narajit v. Kari Sudek* (i) the defendant filed his petition and schedule in the Insolvent Debtors Court and subsequently obtained his personal discharge. On the same day judgment was entered up against him in the name of the official assignee for the full amount of debts stated in the schedule. After this was done the plaintiff who was a scheduled creditor for Rs 5000 entered into an agreement with the insolvent whereby in satisfaction of his claim for Rs 5000 he agreed to accept from the insolvent a present cash payment of Rs 800 and either the execution of a conveyance to him of a certain property or the payment of a further sum of Rs 1600 in cash (see s 63 p 360 post). The creditor sued the insolvent on the agreement and one of the defences was that there was no consideration. It was held that the defendant's promise was not without consideration for the plaintiff by the agreement impliedly gave up his right to share in any future rateable distribution under s 86 of the Insolvent Debtors Act and also the right accords thereto

*Bank of India v. Bank of Bengal* (1881) 3 All 781.

*Shreepatil v. C. and J.* (1880) 11 Ind 381.

(2) *C. and J. v. Munnings* (1880) 77

Mal 159. 5 F C 754. *H. and J. v.*

*Manning & Co.* (1880) 22 Ind 111.

778. A 11 11201 and 11201 and 11

(h) *F. and J. v. K. and J.* (1880) 11

(1880) 11 Ind 633. 617. 617.

(i) See last note.

namely of opposing the final discharge of the insolvent. The agreement however was held to be void as being against public policy within the provisions of s. 23 (g).

**Explanation 1** needs no comment. It may be taken as a statement made by way of abundant caution.

**Explanation 2** declares familiar principles of English law and equity. First the Court leaves parties to make their own bargains: it will not set up its own standard of exchangeable values. There must be some consideration which the law can regard as valuable, but the fact that a promise is given for a certain consideration great or small, shows that the promisor thought the consideration worth having at the price of his promise. Hobbes though not a lawyer and having no love for the Common Law correctly expressed its doctrine when he said in his "*Leviathan*." The value of all things contracted for is measured by the appetite of the contractors and therefore the just value is that which they be contented to give. One or two English examples will suffice. Parting with the possession of goods even for a very short time and though it does not appear what advantage the promisor was to have from it is consideration enough for a promise to return them in the same condition (k). An agreement to continue though not for any defined time, an existing service determinable at will is a sufficient consideration (l). If the owner of a newspaper offers the financial editor's advice to readers who will send their queries to a given address the trouble of sending an inquiry is a sufficient consideration for an undertaking that reasonable care shall be used to give sound advice in answer thereto. It would seem that a contract is concluded as soon as the reader has sent in his inquiry the general offer being not merely an invitation but the proposal of a contract (see pp 55 *sqq* above), though it would also seem that only nominal damages would be recoverable if the editor did not answer at all (m).

Secondly, the fact that a consideration is grossly inadequate may nevertheless be material as evidence of coercion fraud or undue influence. The leading modern dictum on this subject will immediately

(j) See pp 144-167 above.

Lq 518

(k) *Bainbridge v Farmstone* (1878) 8 A & E 734 53 R R 234

(m) *De la Bere v Pearson Ltd* [1908] 1 K B 280, C A

(l) *Gravelly v Barnard* (1874) L R 18

be given as cited in an Indian case by the Judicial Committee. It must be remembered that inadequacy of consideration may be evidence that the promisor's consent was not free, but is no more; it is not of itself conclusive. Standing alone, inadequacy, as such, is not a bar even to specific performance (n).

In a suit (o) to set aside a conveyance on the ground of inadequacy of consideration the Judicial Committee observed: "The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent v. Tennents* (L. R. 2 H. L. Sc 6) in which Lord Westbury very shortly and clearly stated the law upon this subject. He says:—'The transaction having clearly been a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition' Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about or was the victim of some imposition."

In a case (p) decided by the Bombay High Court before the enactment of the Contract Act, a mortgage was executed by ignorant and illiterate peasants, who were seeking to raise moneys for tilling their lands, in favour of the plaintiffs, who were money-lenders by profession. The mortgage included, amongst other unusual provisions, a covenant to sell the property to the mortgagees at a gross undervalue in certain events. In setting aside the mortgage as fraudulent and oppressive, Westropp C. J. said: "Mere inadequacy of consideration, it is true, unless it be so great as to amount to evidence of fraud, is not sufficient ground for setting aside a contract, or refusing to decree a specific performance of it. Inadequacy of consideration, when found in con-

(n) Specific Relief Act, s. 23 (a), see below. And so it is now well understood in England, notwithstanding former conflicting opinions, see Pollock, Contract, 9th ed. 662, 670

(o) *The Administrator-General of Bengal v. Juggeswar Roy* (1877) 3 Cal. 192, 196.

(p) *Kedari Bin Ranu v. Atmarambhai* (1866) 3 B. H. C. A. C. 11.

junction with any other such circumstances as suppression of the value of property misrepresentation fraud, surprise oppression urgent necessity for money weakness of understanding or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts or refuse to decree specific performance of them (g)

Agreement in restraint of marriage void

26.—Every agreement in restraint of the marriage of any person, other than a minor, is void

The wide and unguarded language of this section is taken from the draft Civil Code of New York (s 836). There is very little positive authority in England, but it seems probable that a contract limited to not marrying a certain person or any one of a certain definite class of persons would be held good (r). Apparently such agreements must be held void in British India.

Again an agreement by a Hindu at the time of his marriage with his first wife not to marry a second wife while the first was living would be void according to the literal terms of this section. It may be doubted whether such a result was ever contemplated by the Legislature. The Hindu law recognises polygamy, and as to Mahomedan law a man may have as many as four wives at a time. But neither law binds a man to marry more than one wife. It would seem, therefore that a provision in a *Kabinnamah* by which a Mahomedan husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void, and if the wife divorces herself from the husband on his marrying a second wife, the divorce is valid and she is entitled to maintenance from him for the period of *iddat* (s) see s 23 pp 160 161, *ante*

Agreement in restraint of trade void

27.—Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void

(g) 3 B H C & C at pp 18 19. Compare s 53 of the Transfer of Property Act and ss 25 and 28 (a) of the Specific Relief Act. See to the same effect *Bhat v. Yeshwantrao* (1900) 25 Bom 126

(r) Pollock 9th ed 421—423

(s) *Maharam Ali v. Ayesa Khatun* (1915) 19 C W N 1226 31 I C 562. *Badu Mia v. Badrannessa* (1919) 29 C L J 230 40 I C 803

*Exception 1* — One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein. Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

*Exception 2* — Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding exception.

*Exception 3* — Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

**Agreements in Restraint of Trade** — This section, like the last unfortunately follows the New York draft Code which has been the evil genius of this Act. The first paragraph is taken almost word for word from s 833 of that production. The original draft of the Indian Law Commission did not contain any specific provision on the subject.

The New York draftsmen were of opinion that "contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent" and deliberately tried to narrow the common law. Meanwhile the common law has on the contrary been widening, the old fixed rules as to limits of space have been broken down, and the Court has only to consider in every case of a restrictive agreement whether the restriction is "reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public." In determining thus the nature and extent of the business to be protected are material elements (1). The extension of modern commerce and means of communication has displaced the old doctrine that the operation of agreements of this kind must be confined within a

(1) *Nordenfelt v Maxim Nordenfelt Co* [1894] A C 535 (Lord Macnaghten)

definite neighbourhood But the Anglo Indian law has stereotyped that doctrine in a narrower form than even the old authorities would justify The first and second exceptions are also taken with slight variations from the New York draft Code

The section is general in its terms, and declares all agreements in restraint of trade void (u) *pro tanto*, except in three cases specified in the exceptions The object appears to have been to protect trade It has been said that "trade in India is in its infancy, and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained" (v) That reason, however, cannot have been supposed applicable in New York, and it seems more likely that the New York clause was simply copied without reflection by the draftsman of the Indian legislative department

To escape the prohibition, it is not enough to show that the restraint created by an agreement is partial and not general, it must be distinctly brought within one of the exceptions 'The words 'restraint from exercising a lawful profession trade or business' do not mean an absolute restriction and are intended to apply to a partial restriction a restriction limited to some particular place, otherwise the first exception would have been unnecessary" Moreover "in the following section (s 28) the legislative authority when it intends to speak of an absolute restraint, and not a partial one has introduced the word 'absolutely' The use of this word in s 28 supports the view that in s 27 it was intended to prevent not merely a total restraint from carrying on trade or business but a partial one We have nothing to do with the policy of such a law All we have to do is to take the words of the Contract Act and put upon them the meaning which they appear plainly to bear (w) This view of the section was expressed by Couch C J in *Madhub Chunder v Raycoomar Doss* (x) The parties in that case carried on business as braziers in a certain part of Calcutta The plaintiffs mode of business was found by the defendants to be detrimental to their interests, and an arrangement was thereupon

(u) Certainly not illegal *Haribhai Manellal v Sharafali Isahji* (1897) 22 Bom 861 866

(v) Per *Hundersley J* in *Oakes & Co v Jackson* (1876) 1 Mad 134 145

(w) The generality of the section as thus explained appears to have been overlooked in framing illustration (e) to s 57 of the Specific Relief Act

(x) (1874) 14 B L R 76 85, 86

entered into between the parties whereby the plaintiff agreed to stop his business in that quarter and the defendants promised in consideration of his doing so to pay to the plaintiff all sums which he had then disbursed as advances to workmen. The plaintiff accordingly ceased carrying on business in that locality and the defendants having failed to perform their part of the contract he sued them to recover Rs 900 being the amount advanced by him to the workmen. The agreement was held void under this section though the restriction put on the plaintiff's business was limited to a particular place. If the agreement on the part of the plaintiff is void there is no consideration for the agreement on the part of the defendants to pay the money and the whole contract must be treated as one which cannot be enforced. (y) Similarly a stipulation in a contract prohibiting the defendant from engaging in the cultivation of tea for a period of five years from the date of the termination of his agreement with the plaintiffs was held void although the restriction only extended to a distance of forty miles from the plaintiff's tea gardens. (z) And where by the terms of a contract the plaintiff agreed with the defendant not to carry on the business of a dubash for a period of three years and to act as a stevedore only of five ships to be given to him by the defendant and not to do any services to ships belonging to anybody else for the like period it was held that the agreement was void as the first branch imposed an absolute and the second a partial restraint on the plaintiff's business. (a) In an earlier Madras case a covenant whereby the defendants agreed with the plaintiffs at the time of entering into their service at Madras not to carry on the same business (that of dress makers and milliners) on the expiry of the period of service within 800 miles from Madras was held void as being in restraint of trade. (b)

**Restraint during term of service** An agreement of service by which an employee binds himself during the term of his agreement not to compete with his employer directly or indirectly is not in restraint of trade. If it were otherwise all agreements for personal service for a fixed period would be void. An agreement to serve exclusively for a

(y) (1874) 14 B I R at p 86  
(z) *The Brahmaydra Tea Co Ltd v Malabar* (1885) 11 Cal 51 519  
(a) *Narain Dubash v Abdul Ali* (1877) 10 Cal 65  
(b) *Order of C v Janki* (1861) 1 Mal 134. See all the cases cited in the text.

week a day, or even for an hour necessarily prevents the person so agreeing to serve from exercising his calling during that period for any one else than the person with whom he so agrees. It can hardly be contended that such an agreement is void. In truth, a man who agrees to exercise his calling for a particular wage and for a certain period agrees to exercise his calling and such an agreement does not restrain him from doing so. To hold otherwise would I think, be a contradiction in terms. Such an agreement may be enforced by injunction where it contains a negative clause express or implied (c) providing that the employee should not carry on business on his own account during the term of his engagement (d). Thus in *Charlesworth v Mac Donald* (e) the defendant agreed to serve the plaintiff a physician and surgeon practising at Zanzibar as an assistant for three years. The letter which stated the terms which the plaintiff offered and the defendant accepted contained the words 'The ordinary clause against practising must be drawn up'. No formal agreement was drawn up, and at the end of a year the defendant ceased to act as the plaintiff's assistant and began to practise in Zanzibar on his own account. It was held that the plaintiff was entitled to an injunction restraining the defendant from practising in Zanzibar on his own account during the period of the agreement (f).

**Public policy**—In two recent cases it was suggested that, even if the section did not apply to cases of partial restraint, they might come under ss 23, 24 of the Act. In *Haribhai v Sharafali* (g) Cundy J said 'I would not extend the meaning of s 27 beyond what the words primarily mean. There may be contracts which do not come

(c) See Specific Relief Act 1877 s 57 and (1) below. *Subba Nallu v Haj Balaha* (1907) 26 Mad 168 172. *Iraggi v Irinjwar* (1901) 5 Bom L R 878.

(d) Note that wrongful dismissal of the employee being an entire repudiation of the contract puts an end to an ancillary agreement of this kind no less than to the service itself. *General B Hopoting Co v Atkinson* [1909] A C 118.

(e) (1898) 23 Bom 103. See also *The Brahmaputra Tea Co Ltd v Scarth* (1885) 11 Cal 545 550.

(f) Note that the Specific Relief Act

is not law in Zanzibar. The Bombay Court based its decision on the authority of *Illing v Wigner* (1852) 1 D M G 404 91 R R 193 a rule which is now considered anomalous and will not be extended see *Whitwood Chemical Co v McGregor* [1891] 2 Ch 416 and *Fhrman v Bartholomew* [1898] 1 Ch 671. These later authorities cannot of course affect the application of the Specific Relief Act where it is in force. See s 57 of that Act and notes thereon below.

(g) (1897) 22 Bom 861, 873.

within the terms of that section and its exceptions, and yet may be contracts 'in partial restraint of trade,' and as such contrary to public policy and so void (ss 23, 24, Contract Act). That is the common law doctrine by which restraints of trade, even though partial, are presumed to be bad (*h*), the presumption being rebuttable. It is for the Court to determine whether the contract be a fair and reasonable one or not, and the test appears to be whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or voided. And in *Nur Ali Dubash v Abdul Ali* (i) the Court said: "It is not necessary to consider the effect of s. 24 of the Contract Act upon the case, whether, even had the stipulation in partial restraint of trade not been illegal, the defendant's agreement would not nevertheless have been void, part of the consideration for it having been the undertaking by the plaintiff absolutely to refrain from carrying on the business of dubash. Probably that would be the proper construction of the contract." In a Madras case (j) an agreement whereby certain Hindu workers in lead bound themselves not to carry on their business with the assistance of any persons not belonging to their caste was held to be void. The decision was put on the ground that it would be against public policy to give effect to the agreement as it might cause very serious restraint upon trade operations. There was no reference either in the judgment or argument of counsel to the present section. If there had been the question might have been considered whether the words 'any one' are limited to a party to the agreement, though in this case the parties already purported to restrain themselves to the extent of not employing persons not belonging to their caste, however difficult it might be to carry on the business otherwise.

These suggestions, however, do not seem sound. The present section is very strong, it invalidates many agreements which are allowed by the Common Law and it does not seem open to the Courts to hold that any agreement *in pari materia*, not coming within the terms of the section, is void on some unspecified grounds of public

(h) This mode of stating the law is erroneous. See per Lindley L. J. in *Mills v Dunham* [1891] 1 Ch 576, 587, a case which apparently was not before the learned Judge. You are to con-

strue the contract, and then see whether it is legal."

(i) (1892) 19 Cal 765, 774

(j) *Vaithelings v Saminada* (1876) 2 Mad. 44

plaintiff's failure to state its policy manifestly rendered its policy, its limits and its effect uncertain. (l)

**Agreements not in restraint of trade.** This section contains a contract which happens to be a contract which is either for a limited time or over a limited territory in exercising his profession, trade, or business not contractually with him the exercise of his profession, trade, or business. He enters into ordinary agreements with persons dealing with him which are really necessary for the carrying on of his business. (l) In one sense every agreement for sale of goods whether in effect or in purpose a contract in restraint of trade for if A B agrees to sell goods to C D he precludes himself from selling to anybody else. But a reasonable construction must be put upon the section and not one which would render void the most common form of mercantile contracts (m). Thus a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description they were selling to the defendant is not in restraint of trade (n). Similarly an agreement to sell all the salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade (o). It is otherwise if the agreement while binding the manufacturers not to sell their goods to any other person than the other contracting party does not bind the other party to buy all the produce or any definite quantity. In such a case the agreement is bad as being in restraint of trade. Where twenty-nine out of thirty manufacturers of combs in the city of Patna agreed with R S to supply him with combs and not to sell combs to any one else, with an option to R S not to accept the goods manufactured if he found there was no market for them in Patna Calcutta or elsewhere, the agreement was held void (p). And where A agreed to purchase certain goods from B at a certain rate for the Cuttack market and the

(l) Per Jenkins C J in *Fraser & Co v The Bombay Ice Manufacturing Co* (1905) 29 Bom 107 at p 120.

(l) Per Handley J in *Mackenzie v Striramiah* (1890) 13 M L J 472 475.

(m) 13 Mad at p 474.

(n) *Carlisles, Nephews & Co v Ricknauth Bucktearmull* (1882) 8 Cal 809.

(o) *Mackenzie v Striramiah* (1890) 3 Mad 472, affirmed in appeal sub

nom *Satruppa Ismanjah v Mackenzie* (1891) 15 Mad 79.

(p) *Shrikh Kulu v Jam Siran Bhagat* (1909) 13 C W N 388. It was also said that the agreement was void as creating a monopoly. Q: was there any agreement at all until R S actually accepted some goods? *R v Demers* [1900] A C 103, p 44 above.

contract contained a stipulation that, if the goods were taken to Madras, a higher rate should be paid for them, it was held that the stipulation for the higher rate was not in restraint of trade (q) All that the contract comes to in such a case is that the vendor is to sell the goods at one price if they are sent to Cuttack, but at another price if they are sent for sale to Madras Where the owners of two neighbouring villages, which were let out for holding a cattle market on Tuesdays and Saturdays on payment of market fees, entered into an agreement, to prevent competition and consequent loss to them, that each should let out his village for holding the market on certain specified days, it was held that the agreement was not in restraint of "any profession, trade or business" within the meaning of this section, and it was not therefore void The Court said "It seems to us that a landlord who, in return for market tolls or fees, allows a cattle market to be conducted on his land is not thereby exercising the trade or business of selling cattle" (r)

**Trade Combinations.**—An agreement between manufacturers not to sell their goods below a stated price, to pay profits into a common fund and to divide the business and profits in certain proportions, is not avoided by this section, and cannot be impeached as opposed to public policy under s 23 (s) The question whether an agreement whereby manufacturers agree with one another to carry on their works under special conditions, or traders agree amongst themselves to sell their wares at a fixed price, is in restraint of trade has frequently arisen in English Courts Such agreements have in some instances been disallowed and in others upheld, according as the restraints were or were not deemed to be in excess of what was reasonably sufficient to protect the interests of the parties concerned Agreements of this description do not appear to be common in India, and, so far as we are aware, there are only two Indian decisions, both of the Bombay High Court, in which the question, though raised, was not decided In the first of these cases the owners of four ginning factories, with a view to prevent competition amongst them, entered into an agreement which provided *inter alia* that they should charge a uniform rate of Rs 1-8 per *palla* of cotton to be ginned, and that they should treat Rs 2-8 of that sum as the actual cost of ginning, and that the remaining Rs 2 should be carried to a

(q) *Prem Sook v Dhurum Chini* (1890) 37 All 212, 27 I C 871  
17 Cal 320

(s) *Fraser & Co v Bombay Ice Manu*

*facturing Co* (1904) 29 Bom 107

(r) *P & A Jam v Isfahani Fatima* (1915)

common fund which was to be divided each year between them in proportion to the number of gins which each of them possessed. The agreement was to continue in force for four years. The other parties carried out the agreement, but the defendant though he had credited the Rs 2 to a separate account, refused to pay the plaintiff his share of the amount. The plaintiff sued the defendant to recover his share. The defendant contended that the agreement was in restraint of trade and was therefore not enforceable. The Court held that the plaintiff was entitled to recover his share from the defendant. Farran C J thought that the stipulation that the parties should not charge more than Rs 4-8 per *palla* was in restraint of trade, Candy J was inclined to the contrary view. The decision was put on the ground that the only agreement sought to be enforced in the suit was the agreement to divide the profits which was perfectly lawful and that there was no question in the suit to enforce any of the covenants alleged to be in restraint of trade (t). In the subsequent case of *Fraser & Co v The Bombay Ice Manufacturing Co* (u) Sir Lawrence Jenkins C J expressed a decided opinion that a stipulation restraining the parties to a combination agreement from selling ice manufactured by them at a rate lower than the rate fixed in the agreement was not void under this section. The learned judge said: "The scheme of the agreements was no doubt to limit competition and keep up prices, but that does not necessarily bring them within the terms of section 27 to succeed in the defence under that section. Frasers [the defendants who had refused to abide by the agreement] must establish that the present suit is one to enforce an agreement whereby some one is restrained from exercising a lawful profession, trade or business of any kind (v). In that case four ice manufacturing companies in Bombay with a view to prevent competition among them entered into an agreement which provided *inter alia* that they should not sell ice manufactured by them for less than Rs 58 per ton, that the cost of manufacturing ice should be taken at Rs 17-8 per ton and that the difference between the selling price and the cost price should be brought into a general fund for the benefit of all of them. The agreement was entered into in March, 1902, and it was to remain in force up to 31st December, 1903. In May, 1902, Messrs Fraser & Co, one of the contracting parties, wrote to the

(t) *Haribhai Maneklal v Sharafali Isahj* (1897) 22 Bom 861

(u) (1905) 29 Bom 109

(v) 29 Bom pp 118-119

others stating that the agreement was of no binding force and that from 1st June next they would commence to sell ice at Rs 22 8 per ton Thereupon in July, 1902 the other parties brought a suit against Fraser & Co for an injunction restraining them from selling ice to any person at any lower rate than the agreed rate and to recover from them the amount payable by them to the general fund in pursuance of the agreement Unlike the preceding case therefore, the suit was to enforce the stipulation that none of the parties should sell for less than the agreed rate Thus the question arose whether the stipulation was void under the present section but it was not decided as the period of the agreement expired during the pendency of the suit the Court however, expressed the opinion above stated in favour of its validity That part of the agreement which provided for contribution to the general fund was held to be perfectly valid and enforceable It may be rather a nice question whether agreements which do not restrain a man altogether while they last from exercising a lawful profession trade or business but only restrain as in the case last mentioned the manner in which it shall be exercised, are within this section or not There is English authority for holding such agreements to be in restraint of trade (10) But the present section certainly does not reproduce the Common Law as we have seen It seems, therefore, that it should be construed according to its literal terms When so construed we submit that it only strikes at agreements which operate as a total bar to the exercise of a lawful business for however short a period or however limited the area and does not void agreements which merely restrain freedom of action in detail in the actual exercise of a lawful business The stipulation not to gin cotton or to sell ice for less than a fixed rate is an agreement of this character It does not restrain any party to the contract from ginning cotton or from selling ice, in other words none of the parties is restrained from exercising his business of ginning cotton or selling ice What it does provide for is that in the exercise of the business certain terms shall be observed In an Allahabad case it has been held that agreements such as the above were neither in restraint of trade nor opposed to public policy (11)

“To that extent”—The meaning of these words is that if the agreement can be broken up into parts it will be valid in respect of

(10) *Hilton v Eckersley* (1856) 6 F & (11) *Kuber Nath v Mahal, Fam* (1914)  
B 47 106 R R 60 34 All 287

those parts which are not vitiated as being in restraint of trade Where the agreement is not so divisible, it is wholly void (y)

**Lex loci contractus** —The Courts of this country will not enforce a contract made abroad, to be performed in this country, contrary to the policy of the law of this country An agreement, therefore in restraint of trade made abroad and to be performed in India is void in India though it may be valid by the *lex loci contractus* (z)

**Exception 1** —This exception deals with a class of cases which had a leading part in causing the old rule against agreements in restraint of trade to be relaxed in England The rule arose apparently from a popular dislike of all combinations tending to raise prices which may be compared with the agitation in America against the modern system of "trusts" It has been laid down in quite modern cases as the governing principle, that "no power short of the general law not even the party's own bargain, should be allowed to restrain a man's discretion as to the manner in which he shall carry on his business (a) and originally the rule was without exceptions 'In time, however it was found that a rule so rigid and far reaching must seriously interfere with transactions of everyday occurrence (b) and from the early part of the sixteenth century onwards restrictions "for a time certain and in a place certain," to prevent the seller of a business from competing with the buyer, were allowed In the nineteenth century it was settled that a limit of time was not necessary and contracts for the preservation of trade secrets were held to be outside the rule altogether and finally the House of Lords has declared that there is no hard and fast rule at all The question is always whether the restraint objected to is reasonable with reference to the particular case and not manifestly injurious to the public interest (c)

The law of British India however is tied down by the language of this section to the principle now exploded at home of a hard and fast rule qualified by strictly limited exceptions and however mis

(y) *Parasullah v Chandra Kant* (1917) 21 C W N 979 983, 39 I C 177

(z) *Oakes & Co v Jackson* (1876) 1 Mad 134 144

(a) *Hilton v Eckersley* (1856) 6 E & B 47 74, 106 R R 507 522

(b) Lord Macnaghten in *Nordenfelt &*

*Case* [1894] A C 535 564 see his judgment at large for a full critical discussion of the common law

(c) *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] A C 535

chievous the economical consequences may be the Courts here can only administer the Act as they find it

The kind of cases covered by this exception may be illustrated by a decision some years earlier than the Act. A covenant by the defendants on the sale of the goodwill of their business of carriers to the plaintiff not to convey passengers to and fro on the road between Ootacamund and Mettapolhem was not in restraint of trade. So partial a restraint is not really adverse to the interests of the public at large. (d) In a rather similar later case where the business disposed of was that of a ferry the restraint on the seller being limited to three years the Judicial Committee held without difficulty that there was a sale of a real goodwill (e)

**Exceptions 2 and 3**—Agreements between partners of the kind recognised (though inadequately) by these exceptions have been allowed in England ever since there has been any settled partnership law and are exceedingly common indeed some such clause is rarely absent from partnership articles

**28.**—Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent

**Exception 1**—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred

(1) *Luchterlonie v Charles Bell* (1869) 4 M H C 77

(e) *Chandra Kanta Das v Jorasullah Mullik* (1921) I R 48 I A 508 48 Cal 1030 6 I C 271 Tl H C 117

at Calcutta had held otherwise it is not easy to see why. The mere fact that before the agreement the seller and the buyer were competing for the custom of passengers will clearly not do

When such a contract has been made a suit may be brought for its specific performance and if a suit other than for such specific performance or for the recovery of the amount so awarded is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer the existence of such contract shall be a bar to the suit

[Repealed by Spec. Act 1 of 1928 and Sch. except in the 111 districts where that Act is not in force.]

**Exception 2**—Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen or affect any provision of any law in force for the time being as to references to arbitration

**Agreement in restraint of legal proceedings**—This section applies to agreements which wholly or partially prohibit the parties from having recourse to a court of law. If for instance a contract were to contain a stipulation that no action should be brought upon it that stipulation would under the first part of s. 28 be void because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunals and so if a contract were to contain a double stipulation that any dispute between the parties should be settled by arbitration and that neither party should enforce his rights under it in a court of law that would be a valid stipulation so far as regards its first branch viz. that all disputes between the parties should be referred to arbitration because that of itself would not have the effect of ousting the jurisdiction of the Courts but the latter branch of the stipulation would be void because by that the jurisdiction of the Court would be necessarily excluded. (f) Thus a contract whereby it is provided that all disputes arising between the parties should be referred to two competent London brokers and that their decision should be final, does not come within the purview of this section (g)

(f) Per Garth C. J. in *Coringa Oil Co. Ltd. v. Koegler* (1876) 1 Cal 466 468 469 in appeal from same case in 1 Cal 42. *Mulji Tejising v. Pansi Desraj*

(1909) 34 Bom 13

(g) *Coringa Oil Co. Ltd. v. Koegler* last note

competent, however to parties to a suit under the provisions of the Indian Oaths Act, 1873, to enter into an agreement making the oath of one of them conclusive evidence of all or any of the facts in issue between them. If the oath is made and evidence is given on such oath, it is under s 11 of that Act conclusive as to the matter stated. But if a party after entering into such agreement as aforesaid refuses to make the oath, all that the Court has to do is to record under s 12 the refusal together with the reasons if any and the trial should proceed. It is to this extent only that agreements of this character are recognised under the Indian Oaths Act. An agreement therefore, between A and B that if A made certain statements on the special oath, B would be bound by those statements and that if A refused to take the oath, the suit instituted by A against B should be dismissed is void, as the Oaths Act does not empower a Court to dismiss a suit for such refusal (u)

**“Rights under or in respect of any contract”**—Note that this section applies only to cases where a party is restricted from enforcing his rights under or in respect of any *contract*. It does not apply to cases of wrongs or torts. Nor does it apply to decrees. The expression “contract” does not include rights under a decree (v). The Code of Civil Procedure contains express provisions as to adjustment of a decree and postponement of rights under a decree by mutual agreement of parties to a suit (see Order 21 rule 2)

**Limitation of time to enforce rights under a contract**—Under the provisions of this section an agreement which provides that a suit should be brought for the breach of any terms of the agreement within a time shorter than the period of limitation prescribed by law is void to that extent. The effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period though it may be within the period of limitation. Agreements of this kind must be distinguished from those which do not limit the time within which a party may enforce his rights, but which provide for a *release or forfeiture* of rights if no suit is brought within the period stipulated in the agreement. The latter class of agreements are outside the scope of the present section, and they are binding between the parties. Thus a clause in a policy of fire insurance which

(u) *Moyan v Pathkulatti* (1908) 31 Mad 1      (v) *Lamghulam v Janki Bai* (1884) 7 All 121 131

provides that "if the claim is made and rejected, and an action or suit be not commenced within three months after such rejection all benefits under this policy shall be *forfeited*," is valid, as such a clause operates as a release or forfeiture of the rights of the assured if the condition be not complied with, and a suit cannot be maintained on such a policy after the expiration of three months from the date of rejection of the plaintiff's claim. It was so held by the High Court of Bombay in the *Baroda Spg & Wg Co's* case (u). But this cannot be said of a clause in a policy in the following form: "No suit shall be brought against the company in connection with the said policy later than one year after the time when the cause of action accrues." Such a clause does not operate as a release or forfeiture of the rights of the assured on non fulfilment of the condition but it is to limit the time within which the assured may enforce his rights under the policy, and it is therefore void under the present section. The contrary, however, was held by the High Court of Bombay the ground of the decision being that the clause amounted in effect to an agreement between the parties that if no suit were brought within a year, then neither party should be regarded as having any rights against the other (x). This decision was adversely criticized in the *Baroda Spg & Wg Co's* case (y) by Beaman J and Scott C J, it seems rightly. In a Calcutta case (z) one of the conditions of a policy of marine insurance was that no suit by the assured should be sustainable in any Court unless the suit was commenced within six months next after the loss, and that if any suit was commenced after the expiration of six months, the lapse of time should be taken as conclusive evidence against the validity of the claim. It was held that the assured could not sue on the policy after the expiration of six months. No reference was made either in the argument of counsel or in the judgment to the present section.

No provision is made in the section for agreements extending the period of limitation for enforcing rights arising under it. In a case

(u) *Baroda Spg & Wg Co, Ltd v Salyanarayan Marine & Fire Insurance Co, Ltd* (1914) 38 Bom 344. Followed in *Girdharilal v Eagle, Star & British Dominions Insurance Co, Ltd* (1923) 27 C W N 955, 80 I C 637, *G Rainey v Burma Fire & Marine Insurance Co* (1925) 3 Ran 383, 91 I C 622, A I R

1926 Rang 3

(x) *Hirabhai v Manufacturers Life Insurance Co* (1912) 14 Bom L R 741 [a case of a life policy]

(y) 38 Bom 344, at pp 348-353

(z) *South British and Marine Insurance Co, Ltd v Brojo Nath* (1909) 36 Cal 516, pp 535-536, 533-542

before the Judicial Committee (a) their Lordships expressed their opinion that an agreement that, in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations in respect of the time employed in the inquiry is no bar to the plea of limitation, though an action might be brought for breach of such an agreement. There is hardly any doubt that an agreement which provides for a longer period of limitation than the law allows does not lie within the scope of this section. Such an agreement certainly does not fall within the first branch of the section. There is no restriction imposed upon the right to sue, on the contrary, it seeks to keep the right to sue subsisting even after the period of limitation. Nor is this an agreement limiting the time to enforce legal right. It would, however, be void under s. 23 as tending to defeat the provisions of the Limitation Act, 1908 (b).

**Ordinary tribunals.**—A clause in a bill of lading whereby it was agreed that questions arising on the bill should be heard by the High Court of Calcutta instead of the Court at Mirzapur, which was the proper tribunal to try the questions, is void and cannot be pleaded in bar of a suit brought in the Mirzapur Court (c).

**Exception 1.**—This exception “applies only to a class of contracts where (as in the cases of *Scott v Avery* (d) and *Tredwell v Holman* (e) cited by Phear J (f)) the parties have agreed that no action shall be brought until some question of amount has first been decided by a reference, as for instance the amount of damage which the assured has sustained in a marine or fire policy. Such an agreement does not exclude the jurisdiction of the Courts—it only stays the plaintiff’s hand till some particular amount of money has been first ascertained by

(a) *East India Co v Oulchun Paul* (1849) 5 M I A 43, 70

(b) *Ballepragada v Thammanna* (1917) 40 Mad 701, 35 I C 575. By s. 3 of that Act, subject to certain exceptions contained in the Act every suit instituted after the period of limitation prescribed (by the Act) shall be dismissed although limitation has not been set up as a defence.

*East India Co v Oulchun Paul* (note (a)) the bill was many years before the

Contract Act, proceeded on the Indian Statutes of Limitation.

(c) *Crawley v Luchner* (1866) 1 Agra 129 cp and dist. *Wardell v Lupton* (1928) 49 Mad 133. I C 181. A I R 1928 Mad 183 (an all drawn bill saved by its character not really negotiable).

(d) (1880) 5 M I C 811.

(e) (1862) 1 H C C 72.

(f) *In Koepler v The Corporation of London* (1870) 1 C 113.

reference" (g) An agreement between a tramway company and a conductor that the manager of the company shall be the sole judge as to the right of the company to retain the whole or any part of the deposit to be made by the conductor as security for the discharge of his duties, and that his certificate in respect of the amount to be retained shall be conclusive evidence between the parties in Courts of justice, comes within this exception. Such an agreement does not oust the jurisdiction of the Courts. Its effect is merely to constitute the manager the sole arbitrator between the company and the conductor as to whether, in the event of the conductor's misconduct, the company is entitled to retain the whole or any part of the deposit. The point is very similar to those which so frequently occur in England where an engineer or architect is constituted the arbitrator between a contractor and the person who employs him as to what should be allowed in case of dispute for extras or penalties (h). It must not be supposed that the use of such terms as 'sole judge' necessarily imposes any duty of proceeding in a quasi-judicial manner.

This class of cases must be distinguished from those where the obligation of a promisor such as the duty of paying for work to be done or goods to be supplied is made by the terms of the contract, to depend on the consent or approval of some person, as in a builder's contract, the certificate of the architect that the work has been properly done. Here there is no question of referring to arbitration or anything like arbitration a dispute subsequent to the contract but the contract itself is conditional or, in the language of the Act contingent (ss 31—36, below).

**Exception 1, Second Clause.**—This clause was repealed by the Specific Relief Act. S 21 of that Act provides that, 'save as provided by the Code of Civil Procedure no contract to refer a controversy to arbitration shall be specifically enforced, but if any person who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such

(g) Per Garth C J in *Coringa Oil Co., Ltd v Koegler* (1876) 1 Cal 466, 469, *Cooverji v. Bhimji* (1882) 6 Bom 528, 536.

(h) *Aghore Nath Bannerjee v The Calcutta Tramways Co., Ltd* (1885) 11 Cal 232, following *London Tramways Co v Bailey* (1877) L R 3 Q B D 217.

*Kuppusami Naidu v Smith & Co* (1895) 19 Mad 178, and see *Perry v Liverpool Malt Co* [1900] 1 Q B 339, C A as to the immunity of the person appointed a quasi-arbitrator from being sued for negligence, see *Chambers v Goldthorp* [1901] 1 K B 624, C A.

29. contract shall bar the suit " If a suit is brought in respect of any such subject, it must be shown by the defendant, before he could rely upon the section as a bar to the suit, that the agreement is still operative (i), and that the plaintiff has refused to perform it. The mere act of filing the plaint is not such a refusal (j)

**Remedies for breach of agreement to refer.**—There are three remedies open to a party to a reference for breach of the agreement. He may sue for damages for the breach, or he may have the agreement specifically performed in the manner provided by the Code of Civil Procedure (k) or he may plead the agreement in bar of any suit that may be brought against him in violation of the terms of the agreement as provided by the Specific Relief Act s. 21. But the provisions of the Code and of the Specific Relief Act have no operation wherever the Indian Arbitration Act applies (l). Both these remedies however are still available but in a somewhat different form under the provisions of the Arbitration Act.

**Conventional restrictions of evidence.**—An agreement purporting to prevent the ordinary evidence of payment between the parties from being received has been disregarded as being an unwarrantable interference with the jurisdiction of the Court. Where a bond contained a stipulation enabling the obligee to treat as a nullity payments not endorsed in writing on the bond, it was held that the stipulation was against good conscience and did not preclude the obligor from proving payments alleged to have been made by him by oral evidence (m). Such a stipulation "cannot be permitted to control Courts of justice as to the evidence which keeping within the rules of the general law of evidence in this country, they may admit of payments. There is nothing in that law which would warrant our Courts in excluding direct oral evidence of payment."

Agreements void for uncertainty 29.—Agreements, the meaning of which is not certain, or capable of being made certain, are void (n).

(i) *Tahal v. Bisheshwar* (1885) 8 All 57  
*Sheoambar v. Deolal* (1887) 9 All 168 172

(j) *Kornul Chunder Dass v. Chunder Kant Mukerjee* (1879) 5 Cal 418  
*Tahal v. Bisheshwar* (1885) 8 All 57

(k) See Sched. II cl. 17, 19

(l) Sec. 3 of the Act

(m) *Narayan Lal v. Palt v. Mittal* (1871) 1 Bom 45

(n) It is really too clear that where a proposal is accepted by a person in the absence of an express acceptance

*Illustrations*

(a) A agrees to sell to B a hundred tons of oil. There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(1) A agrees to sell to B one hundred tons of oil of a specified description known as an article of commerce. There is no uncertainty here to make the agreement void.

(2) A, who is a dealer in coconuts, agrees to sell to B one hundred tons of oil. The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil.

(3) A agrees to sell to B all the grain in a granary at Bannagar. There is no uncertainty here to make the agreement void.

(c) A agrees to sell to B one thousand maunds of rice at a price to be fixed by C. As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A agrees to sell to B my white horse for rupees five hundred or rupees one thousand. There is nothing to show which of the two prices was to be given. The agreement is void.

Attempts have been made to impugn pre-emption agreements of a kind quite common in India on the ground of uncertainty. See *Aulad Ali v. Ali Iftar* (1927) 49 All 527, 100 I C 683; *Basdeo Rai v. Hagra Rai* (1924) 46 All 333, 83 I C 390. The objection is not intelligible to a merely English legal mind. These cases were complicated with objections on the ground of perpetuity, see p. 263 below.

**Ambiguous contracts.**—The text and (with one addition) the illustrations of this section follow the draft of the Indian Law Commissioners with only formal variation. As the illustrations are plain and sufficient to explain the meaning of the section, it seems useless to add others from English decisions.

Sec. 93 of the Evidence Act provides that when the language of a document is ambiguous or defective no evidence can be given to explain or amend the document. See also ss. 94-97 of the same Act. Neither will the Court undertake to supply defects or remove ambiguities according to its own notions of what is reasonable, for this would be not to enforce a contract made by the parties, but to make a new contract for them. The only apparent exception to this principle is that when goods are sold without naming a price, the bargain is understood to be for a reasonable price. This was probably introduced in England on the assumption that there was an ascertainable market price, and then extended to all cases.

Sec 21 of the Specific Relief Act overlaps this section, see our Commentary thereon below

Where the defendants, describing themselves as residents of a certain place executed a bond and hypothecated as security for the amount 'our property, with all the rights and interest' (o) it was held that the hypothecation was too indefinite to be acted upon. The mere fact that the defendants describe themselves in the bond as residents of a certain place is not enough to indicate their property in that place as the property hypothecated. If they had described themselves as the owners of certain property it would then have been reasonable to refer the indefinite expression to the description (p). And where the defendant passed a document to the Agra Savings Bank whereby he promised to pay to the manager of the bank the sum of Rs 10 on or before a certain date "and a similar sum monthly every succeeding month," it was held that the instrument could not be regarded as a promissory note (q) as it was impossible from its language to say for what period it was to subsist and what amount was to be paid under it (r). Similarly it has been held that a stipulation in a *patta* (lease) whereby the tenant agreed to pay whatever rent the landlord might fix for any land not assessed which the tenant might take up (presumably without permission) is void for uncertainty. Under such a *patta* the landlord might fix any rent he liked and the tenant might be liable for an unreasonable rent beyond the value of the land (s). But where the proprietor of an indigo factory mortgaged to B all the indigo cakes that might be manufactured by the factory from crops to be grown on lands of the factory from the date of the mortgage up to the date of payment of the mortgage debt it was held that the terms of the mortgage were not vague and that the mortgage was not void in law (t). It has been suggested that an agreement is too uncertain to be enforced if no limit to the time for

(o) The original words were *hakikat apne kul haq haqul*

(p) *Deputy P. L. bar* (1878) 1 All 275

(q) A promissory note is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking signed by the maker to pay a certain sum of money only to or to the order of a certain

person or to the bearer of the instrument. See Negotiable Instruments Act 1881 of 1881 s 4

(r) *Carter v The Agra Savings Bank* (1883) 5 All 502

(s) *Pamunani v Rajagopala* (1887) 11 Mad 200

(t) *Bollen Parshad v Miller* (1901) 21 Cal 607 676-678

performance is expressed or can be inferred from the nature of the case. This does not appear acceptable as a general proposition (u)

**30.—Agreements by way of wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.**

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards to be awarded to the winner or winners of any horse-race.

Exception in favour of certain prizes for horse racing

Nothing in this section shall be deemed to legalise any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code apply.

Section 294A of the Indian Penal Code not affected

**Wagering contracts.**—This section represents the whole law of wagering contracts now in force in British India, supplemented in the Bombay Presidency by Act III of 1865. It superseded Act XXI of 1848 (an Act for avoiding wagers). That Act was based principally on the English Gaming Act of 1845 (8 & 9 Vict. c. 109), s. 18, and was repealed by the Contract Act (see the schedule to the Act). Before the Act of 1848 the law relating to wagers in force in British India was the Common Law of England. By that law an action might be maintained on a wager, if it was not against the interest or feelings of third persons, did not lead to indecent evidence, and was not contrary to public policy (v).

There is no technical objection to the validity of a wagering contract. It is an agreement by mutual promises, each of them

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(u) See *Muhammad Jan v. Fazal ud Din* (1924) 46 All. 514, 85 I. C. 482, A. I. R. 1924 All. 657 (opinions divided).  
 (v) *Ramloll Thackoorseydass v. Soojunmull Dhondmull* (1848) 4 M. I. A. 339, *Doolubdass Pettamberdass v. Ramloll Thackoorseydass* (1850) 5 M. I. A. 109, *Rughoonauth v. Manickchand* (1856) 6 M. I. A. 251.

conditional on the happening or not happening of an unknown event. So far as that goes, promises of this form will support each other as well as any other reciprocal promises. It would have been better if the Courts in England had refused, on broad grounds of public policy, to admit actions on wagers; but this did not occur to the Judges until such actions had become common, and, until a remedy was provided by statute, they could only find reasons of special public policy in special cases, which they did with almost ludicrous ingenuity (*w*).

**What is a wager?**—A wager has been defined as a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying [this should be “promising to pay”] to him money on the event not happening (*x*). But Sir William Anson’s definition, “a promise to give money or money’s worth upon the determination or ascertainment of an uncertain event,” is neater and more accurate. To constitute a wager “the parties must contemplate the determination of the uncertain event as the sole condition of their contract.” One may thus distinguish a genuine wager from a conditional promise or a guarantee. Anson, *Law of Contract* 17th ed. 221, 222. “But if one of the parties has the event in his own hands, the transaction lacks an essential ingredient of a wager” (*y*). “It is of the essence of a wager that each side should stand to win or lose according to the uncertain or unascertained event in reference to which the chance or risk is taken” (*z*).

In *Alamara v. Postwar Government Security Life Assurance Co* (*a*), a case of life insurance, Fulton J. said: “What is the meaning of the phrase ‘agreements by way of wager’ in s. 30 of the Contract Act?”

Can it be that the words mean something different in India from what the corresponding words ‘agreements by way of wagering’ mean in England? I do not see how such an argument can be maintained, or how the fact that 14 Geo. III. c. 18 is not in force in India

(*w*) Pollock *Contract*, 9th ed. 780 and see for the history of English legislation Anson, 17th ed. 221 *et seq.*

(*x*) *Hampton v. Walsh* (1876) 1 Q. B. D. 189, 192. See also per Lord Brampton in *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 Q. B. 481, 490 and Anson 17th ed. 221.

(*y*) Per Bristow and J. in *Dagobert v.*

*Prithwan Das v. Lakhmichand Lalchand* (1884) 9 Bom. 358, 363 (after citing the passage from Sir W. Anson as it stood in an earlier edition).

(*z*) Per Jenkins C. J. in *Stinson v. Tickersey* (1904) 28 Bom. 616 p. 621.

(*a*) [1898] 27 Bom. 191.

affects the question. In *Hampden v Walsh* (b) Cockburn C J defined a wager as a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening and said that since the passing of 8 & 9 Vict c 109 there is no longer as regards action any distinction between one class of wager and another all wagers being made null and void at law by the statute. In *Thacker v Hardy* (c) Cotton L J said that the essence of gaming and wagering was that one party was to win and the other was to lose upon a future event which at the time of the contract was of an uncertain nature but he also pointed out that there were some transactions in which the parties might lose and gain according to the happening of a future event which did not fall within the phrase. Such transactions of course are common enough including the majority of forward purchases and sales (d).

A certain class of agreements such as bets by common consent come within the expression 'agreements by way of wagers'. Other such as legitimate forms of life insurance do not though looked at from one point of view they appear to come within the definition of wagers. The distinction is doubtless rather subtle and probably lies more in the intention of the parties than in the form of the contract. In such doubtful cases it seems to me that the only safe course for the Courts in India is to follow the English decisions and that when a certain class of agreement has indisputably been treated as a wagering agreement in England it ought to receive the same treatment in India (e).

**"By way of wager"**—There is no distinction between the expression 'gaming and wagering' used in the English Act and the Act of 1848, and the expression 'by way of wager' used in this section (f). The cases (g) therefore bearing on the expression used in those Acts

(b) (1875) 1 Q B D 189

(c) (1878) 4 Q B D 685 695

(d) See notes below. Sp c lative transactions p 244

(e) See *Trimble v Hill* (1879) 5 App Ca 342 and *Kathama Natch ar v Dora singu* (1875) L R 2 I A 169 180

(f) *Kong Yee Lone & Co v Loujee*

*Nanjee* (1901) 9 Cal 401 I R 98 I A 231

(g) See especially *The Universal Stock Exchange Ltd v Strachan* [1896] A C 166 and *In re Cete* [1899] 1 Q B 794 both decided under the English Act of 1845

are still useful in construing the expression "by way of wager," used in the present section

Wagering contracts may assume a variety of forms, and a type with which the Courts have constantly dealt is that which provides for the payment of differences (*h*) in stock transactions with or without colourable provisions for the completion of purchases. Such provisions, if inserted will not prevent the Court from examining the real nature of the agreement as a whole (*i*). "In order to constitute a wagering contract neither party should intend to perform the contract itself but only to pay the differences" (*j*). It is not sufficient if the intention to gamble exists on the part of only one of the contracting parties. Contracts are not wagering contracts unless it be the intention of *both* contracting parties at the time of entering into the contracts under no circumstances to call for or give delivery from or to each other" (*k*). It is not necessary that such intention should be expressed. "If the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction but a wager on the rise or fall of the market. This was laid down by the Judicial Committee in *Hong Yee Lone & Co v Loujee Nanjee* (*l*) on appeal from the Court of the Recorder of Rangoon. The plaintiff in that case was a rice trader, the defendants were rice millers, having a small mill capable of putting out 30,000 bags in a month. During seven weeks in June, July, and August, 1899, the defendants entered into several contracts with the plaintiff for the sale to him of 199,000 bags of rice

(*h*) *Doshi Talakhshi v Shah Ujama* (1889) 24 Bom 227, 229

(*i*) *Re Giete* [1899] 1 Q B 794, C A

(*j*) *Perasha v Manekji* (1898) 22 Bom 899, 903, *The Universal Stock Exchange v Strachan* [1896] A C 166, *Fshoor Doss v Venkatasabba Pan* (1895) 18 Mad 306, *Sukherdas v Gorindas* (1928) L R 55 I A 72, 107 I C 29, A I R 1928 P C 30 a case of patti patti transactions in Madras

(*k*) *J H Tod v Lalhmidas* (1892) 16 Bom 441, 445 446, *Ajudhis Prasad*

*Lalman* (1902) 25 All 38, *Sisson v Tolersey* (1904) 28 Bom 616 *Motilal*

*v Goundram* (1905) 30 Bom 83, *Hur mulkhas v Narotamlal* (1907) 9 Bom L R 125, *Kesarichand v Merwanjee* (1899) 1 Bom I R 263, *Meghji v Jathorji* (1910) 12 Bom I R 1072. Therefore a contract cannot be made a wager by matter subsequent. *Pranghji v Hulumbhand* (1923) 129 I C 106

(*l*) (1901) 29 Cal 461, 467, 1 P 28 I A 239

at various prices aggregating upwards of five crores of rupees and the latest delivery was to be on 7th October 1899. The rice was to be delivered from amongst a number of specified mills in which the defendants' mill was not included. In the same year, by fourteen contracts ranging in time from January to the end of August the defendants sold to the plaintiff 22 250 bags of rice to be delivered from the defendants' mill. The latter contracts were all duly fulfilled by delivery and payment. None of the former contracts were performed and the defendants passed to the plaintiff a promissory note for difference on rice. In a suit upon the note it was held by the Recorder of Rangoon that there was no common intention to wager and that the plaintiff was entitled to succeed. The judgment was reversed by the Judicial Committee on appeal on the ground that the consideration for the note was a number of wagering contracts within the meaning of the present section. Their Lordships observed. Now the output of the firm itself would not be much over 60 000 bags during the currency of the contracts and they (defendants) had dealings with other persons besides the plaintiff. The capital of the firm as stated was a trifle more than a lac of rupees. The cost of the goods would be that amount multiplied five hundredfold. It is possible for traders to contemplate transactions so far beyond their basis of trade but it is very unlikely. In point of fact they never completed nor were they called on to complete any one of the ostensible transactions. The rational inference is that neither party ever intended completion. When the two classes of contracts are compared the one class suitable to traders such as the defendants and fulfilled by them the other extravagantly large and left without any attempt at fulfilment the rational inference is strengthened into a moral certainty. Similarly in *Doshi Talakshi v. Shah Ugamsi Ielis (m)* certain contracts were entered into in Dholera for the sale and purchase of Broach cotton a commodity which it was admitted never found its way either by production or delivery to Dholera. The contracts were made on terms contained in a printed form which incorporated the rules framed by the cotton merchants of Dholera. Those rules expressly provided for the delivery of cotton in every case and forbade all gambling in differences. The course of dealings was however such that none of the contracts was ever completed except by payment of differences.

between the contract price and the market price in Bombay on the *saída* (settlement) day. It was held upon these facts that the contracts were by way of wager within the meaning of this section. Jenkins C J said: "Here in each case the contract was made at Dholera, between men of Dholera, and under the rules of Dholera and from the evidence we know that the witnesses who have been called have not been able to indicate with certainty or even to suggest with one doubtful exception, a single instance since the formulation of those rules in 1892 in which any one of the numerous contracts similar to that with which we are now dealing has been completed otherwise than by payment of differences. Is it an unnatural or strained inference to draw from these facts that behind these apparently innocent documents there is a tacit and recognised understanding according to which parties who enter into these contracts do so without any intention of performing them otherwise than they have consistently and without exception been performed, that is to say by payment of differences? In my opinion that is the reasonable and natural inference to be drawn. It agrees with the experience of the past and it represents the actual results in the particular instances we are now considering." On the other hand, the *modus operandi* may be such as to raise a presumption against the existence of a common intention to wager. This infrequently happens when agreements of a speculative character are entered into through the medium of brokers, and when, according to the practice of the market, the principals are not brought into contact with each other nor do they know the name of the person with whom they are contracting, until after the bought and sold notes are executed. Under circumstances such as these, when a party launches his contract orders he does not know with whom the contracts would be made (n). And this presumption is considerably strengthened when the broker is authorised by the principal to contract with third persons in his (the broker's) own name, for the third person may in such case remain undisclosed even after the contract is made (o). But the presumption may be rebutted by evidence of a common intention to wager, though the contract has been brought about by a broker. Thus in *Esloor Doss v Venkatasubba Rau* (p) the same broker had acted for both the

(n) *J. H. Tidd v Lalbhajirao* (1892) 16 B.O. 540; *Sutton v Tacey* (1904) 24 B.O. 616.  
 (o) *Pereda v Manojji* (1898) 22 B.O. 71; (1893) 18 Mad. 707.

plaintiff and the defendant and it was found that though the parties were not brought into contact at the time defendant contracted to sell Government paper to plaintiff, *each* had made inquiry beforehand of the broker not whether the other would be able to deliver Government paper, but whether he would be able to pay differences and this circumstance along with other circumstances was deemed sufficient to establish that the intention on either side was to pay differences only. The presumption against a wager was applied in a case where the transactions were in Government paper to the extent of about half a crore of rupees and the plaintiff was both stockbroker and stockjobber, and the defendant was a stockjobber. The magnitude of the transactions in the case was set up by the defendant to support the contention that the transactions were by way of wager and reliance was placed on the Privy Council decision in *Hong Yee Lone's* case, cited p. 34 above. But the contention was overruled and the Court said 'In the Privy Council case the defendant was a rice miller or a producer by trade and the wager related to quantities of rice enormously out of proportion to his output and capital, deliverable at option from a number of specified mills. Here there is, I think, sufficient proof that the defendant was known in the market as the largest of jobbers (g) and the capital available for the purchases which he bargained for was at least presumably to be supplied by the constituents for whom a jobber is ordinarily supposed to be acting' (r).

Exception has been taken to the words 'under no circumstances' which occur in the following passage in the judgment of Farran J in the case of *J H Tod v Lakhmidas* (s) referred to above. Contracts are not wagering contracts unless it be the intention of both contracting parties at the time of entering into the contracts *under no circumstances* to call for or give delivery from or to each other.

On this Bachelor J observed in *Motilal v Govindram* (t) 'It may perhaps be doubted whether the phrase 'under no circumstances' which does not appear to have been prominently brought before the Court of Appeal in *Doshi Talakshi's* case (u), is not rather an over

(g) The evidence showed that seven lacs would be a small day's turnover for a big jobber in an active market.

(r) *Dadji v Madharam* (1903) 5 Bom

L R 768.

(s) (1897) 16 Bom 441 445.

(t) (1903) 30 Bom 83 at p 90.

(u) (1899) 24 Bom 227.

statement of the requirements of the law ; and upon this point I would refer to the decision in *In re Gire* (r). And Daver J. said in *Hurmukhrai v. Narotamdass* (w) : " I have no hesitation in saying that the expression ' under no circumstances ' is much too wide, and if the words of Mr. Justice Farran were to be taken too literally, their effect would be to render the provisions of s. 30 of the Contract Act more or less nugatory." On the other hand, Berman J. said in a later case, " I think that the dictum of Farran J., subjected to rigorous analysis, will be found to be perfectly correct. I believe that before a Court can hold a contract, on the face of it genuine, or at any rate not clearly wagering as the contract in *In re Gire* (x) was, to be a wagering contract, the Court must be satisfied that the intention of the parties was in no circumstances either to give or take delivery " (y) In *In re Gire*, referred to above, the contract in terms gave the buyer an option to demand delivery upon the payment of a small excess commission. It was argued that, even if the contracts were for the payment of differences only, the power in either party to turn them into real contracts by insisting upon delivery prevented them from being wagering contracts, but the Court of Appeal disallowed the contention. Lindley M R said " It is a gaming transaction plus something else " The case must be distinguished from that of a forward contract for the sale of goods, with the condition that if the seller fails to give the delivery order in time the contracts shall be settled by payment of the difference between the contract rate and the market rate prevailing on the due date In such a case, if the seller forwards the delivery order in time to the buyer, no question arises as to payment of differences, and the contract, it has been held, is not a wagering contract As observed by Scott C J, " There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event, the contract is void as a wager if that event does not arise Such a result would be inconsistent with the principle underlying s 57 of the Indian Contract Act " (z) But what if the seller fails to send the

(r) [1899] 1 Q B 794, C A

(w) (1907) 9 Bom L R 125 at pp 136

(x) [1899] 1 Q B 794

(y) *Mathuradas v. Narotamlal*

(1909) 11 Bom L R 997, at p 1004

(z) *Narotamlal v. Mathuradas*

(1910) 12 Bom L R 1078 on appeal from

*Mathuradas v. Narotamlal* (1909) 11

Bom L R 997

delivery order in time, in which case the contract is to be settled by payment of difference? The point arose in *Champsey v Gill & Co (a)*, where it was held that in such a case the agreement was by way of wager. That was a case of a forward contract for the sale of cotton with the condition that "if before the maturity of the contract either party thereto shall suspend payment or become bankrupt or insolvent, the other party shall be bound to forthwith close the contract, and when the contract is thus closed, the measure of damages shall be the difference between the market price current at the time of closing for similar goods for delivery at the time named in the contract so closed and the rate named in the contract the damages ascertained as aforesaid shall become at once payable to or by the party closing the contract." The seller suspended payment before the due date, and subsequently sued the buyer to recover the difference. Tyabji J held that the contract was not a wager. In appeal it was held that the contract was a wager (aa).

**Teji Mandi Transactions**—In a Bombay case Beaman J held that *teji mandi* transactions were transactions by way of wager, and they were void under this section (b). In a later case where fuller evidence was adduced the learned Judge said "I still, however, adhere generally to the view that in this country the rule ought to be that transactions shown to be *teji mandi* are wagering transactions, and that the onus of proving that they are not would lie heavily indeed upon the party so alleging." (c). The learned Judge observed that there might be exceptional cases in which *teji mandi* like the Liverpool double option might represent fair business dealings. But this case has been adversely commented upon and the usual test of common intention to give and take delivery applied (d). The above decisions were considered in a recent case where it was held that the mere fact that a transaction was *teji mandi* did not make it a wagering transaction. To constitute it a wager it must be proved that there was

(a) (1897) 7 Bom L R 80. On appeal from 7 Bom L R 151.

(aa) *Hira Lal Umrao Singh & Sons v Pam Jij Mohan Lal* (1915) 86 I C 656. A.I.L. 1925 All 102 is merely on the question of fact whether the plaintiff was principal or agent.

(b) *J. Chandra v. Chandra* (1916)

12 Bom L R 150.

(c) *Jeevan v. T. I. I.* (1913) 37 Bom L R 41 at p. 47.

(d) *Mahilal Dhanoo v. Al. Jai Chagla* (1917) 47 I M 63. 41 Bom L R 81. 48 I C 481. See also *Mansabhai v. Akary* (1917) 47 Bom L R 63. I C 652.

a common intention to pry differences only. And this, it is submitted, is the correct rule (e).

**Agreements between Pakka Adatia and his constituents**—It was at one time held in some Bombay cases that a pakka adatia was merely the agent of his constituent, and that therefore no transaction between them could be a wagering transaction. In *Bhagchandras v Hanji* (f), however, it was held on the evidence of custom that as regards his constituent the pakka adatia was a principal and not a disinterested middleman bringing two principals together. Since that decision it has been held by the High Court of Bombay in two cases that a transaction between a pakka adatia and his constituent may be by way of wager like any other transaction between two contracting parties, and that the existence of the pakka adiat relation ship does not of itself negative the possibility of a contract being a wagering contract as between them (g). One of those cases was taken to the Privy Council, and though the decree of the High Court of Bombay was reversed the Judicial Committee, Privy Council, taking a different view of the facts the principle laid down by the Bombay High Court was affirmed by that tribunal (h).

**Agreements collateral to wagering contracts**—Thus far our observations are confined to suits between the principal parties to a contract. Different considerations apply where the suit is brought by a broker or an agent against his principal to recover his brokerage or commission in respect of transactions entered into by him as such or for indemnity for losses (i) incurred by him in such transactions on behalf of his principal.

(e) *Manilal Dharamdas v Allibhai Chagla* (1922) 47 Bom 263, 24 Bom L R 812 C S I C 481 approved.

*Sahajanil Ganmal v Mukundchand Bilia* (1926) L R 53 I A 241. *Prafulla Prasad v Lajpat Lal* (1921) 50 All 117 102 I C 218.

(f) (1905) 11 Bom 230.

(g) *Burjee v Bhagchandras* (1914) 38 Bom 234 20 I C 831. *Chhajraj v Jainarayan* (1911) 39 Bom 1 21 I C 743.

(h) *Bhagchandras v Burjee* (1918) I R 4 I A 20 47 Bom 373 41 I C 284. See also *Manilal Dhanabhai Pitha*

*Asson Lamjwan* (1921) 45 Bom 386, 62 I C 301.

(i) See s 222 below which provides that the principal is bound to indemnify the agent against the consequences of all lawful acts. Since a wagering contract is void and not unlawful the principal who is not exempted is discharged from liability on the ground that the loss on betting is not a consequence of an unlawful act. *Telu Mal v Subba Sanyal* (1884) 10 Puri 100. *Lajpat Lal v Manilal* (1921) 102 I C 218.

Apart from a Bombay enactment to be presently noticed there is no statute which declares agreements collateral to wagering contracts to be void. Nor is there anything in the present section (j) to render such agreements void. It has accordingly been held that a broker or an agent may successfully maintain a suit against his principal to recover his brokerage, commission, or the losses sustained by him, even though contracts in respect of which the claim is made are contracts by way of wager (k). It does not follow because a wagering contract is void that contracts collateral to it cannot be enforced. "The fact that a person has constituted another person his agent to enter into and conduct wagering transactions in the name of the latter, but on behalf of the former (the principal) amounts to a request by the principal to the agent to pay the amount of the losses, if any, on those wagering transactions" (l) and if such payment is made, the agent is entitled to recover the amount from him. Conversely, an agent who has received money on account of a wagering contract is bound to restore the same to his principal (m). On the same principle a suit will lie to recover a sum of money paid by the plaintiff for the defendant and at his request, though such sum represents the defendant's loss on

(j) The expression "void" in the section does not mean unlawful. *Pringle v Jafer Khan* (1883) 5 All 443 445, *Shibhmal v Lachman Das* (1901) 23 All 165 166, *Juggernaut Sew Bux v Ram Dayal* (1883) 9 Cal 791 796.

(k) *Shibho Mal v Lachman Das* (1901) 23 All 165, *Jagat Narain v Sri Kishan Das* (1910) 33 All 219. *Bisheshwar Dayal v Jwala Prasad* (1914) 36 All 126. *Bishti Chand v Kacchhu Mal* (1921) 45 All 503, *Daya Ram v Murlu Dhar* (1927) 49 All 926, 102 I C 60, 25 All L J 693, *Cheikka v Cappa* (1904) 14 Mad L J 326. *Rignath Sahl v Mam Ray* (1895) Punj Rec no 80. *Telu Mal v Subha Singh* (1880) Punj Rec no 90. Much more can the principal recover from the agent money deposited with him as security. *Hardeo Das v Ram Prasad* (1926) 49 All 438, 100 I C 774. A I R 1927 All 238.

(l) *Parakh Govardhanbhai Haribhai v Panwardas Dilalhdhas* (1875) 12 B H C 51 57. This case though decided in 1875 was not decided under Bombay Act III of 1861 as the agreement sued upon was entered into before that Act came into operation. See also *Tribhuvan Das v Mital* (1863) 1 B H C 34. Both these cases followed *Jorawernal Sula v Dadoji Bai Berasi* decided by Sir M Sausse C J in the Supreme Court of Bombay on its Plea side on 14th April, 1859. The agent's right to recover is, of course limited to payments actually made and enforceable liabilities incurred. See *Mutaddi Lal Sewa Ram v Bhagirath* (1929) 115 I C 424, 10 Lah L J 522. A I R 1929 Lah 375 and note on s 222 p 623 below.

(m) *Bhola Nath v Mul Chand* (1903) 25 All 639, *Debi Sahai v Ganesh Lal* (1901) Punj Rec no 46.

0. a bet (n) Similarly money lent for gaming purposes (o), or to enable the defendant to pay off a gambling debt (p) is recoverable. Such transactions are neither against the provisions of the present section nor of s 23 (q). The law is, however, different in the Presidency of Bombay. In that Presidency, contracts collateral to or in respect of wagering transactions are prevented from supporting a suit by the special provisions of Bombay Act III of 1865 (r). "That Act was passed to supply the defect which *Joratermal Sulal v. Dadabhai Beramji* (rr) and other similar cases disclosed in Act XXI of 1818 (which excluded suits on wagering transactions), and to close the doors of the Courts of Justice in the Presidency to suits upon contracts collateral to wagering transactions where such collateral contracts have been entered into or have arisen since the Act came into force, a purpose which it has effectually answered" (s). Secs 1 and 2 of the Act run as follows —

Sec 1 All contracts whether by speaking writing or otherwise knowingly made, to further or assist the entering into effecting or carrying out agreements by way of gaming or wagering and all contracts by way of security or guarantee for the performance of such agreements or contracts, shall be null and void and no suit shall be allowed in any Court of justice for recovering any sum of money paid or payable in respect of any such contract or contracts or any such agreement or agreements as aforesaid.

Sec 2 No suit shall be allowed in any Court of Justice for recovering any commission brokerage fee or reward in respect of the knowingly effecting, or carrying out or of the knowingly aiding in effecting or in carrying out or otherwise claimed or claimable in respect of any such agreements by way of gaming or wagering or any such contract as aforesaid whether the plaintiff in such suit be or be not a party to such last mentioned agreement or contract, or for recovering any sum of money knowingly paid or payable on account of any persons by way of commission brokerage fee or reward in respect of any such agreement by way of gaming or wagering or contract as aforesaid.

But the transaction in respect of which the brokerage, commission, or losses are claimed must amount to a wagering agreement, and it is

(n) *Pringle v. Jafar Khan* (1883) 5 All. 443.

(o) *Subbaraya v. Demintra* (1884) 7 Mad 301.

(p) *Bina Mulik Das v. Kausar Ali* (1900) 22 All 452.

(q) 22 All 452, *supra*.

(r) This Act is still in force though Act XXI of 1818 of which it formed part, has been repealed and must be read with the present section so far as

the Bombay Presidency is concerned. *Diyabhai Tribhavanji v. Lalhmichand Pinachand* (1883) 9 Bom 358 362, *Lerosha v. Manelji* (1878) 22 Bom 899 902, *Doshi Tribhuvanji v. Shakh Gajmanji* (1899) 24 B m 227 232.

(rr) See note (l) p 241.

(s) *Per We tropp C. J. in Parth C. v. Anandhadas Hariharan v. Pannalal Dulabhai* (1873) 12 B H C 51, 58.

no answer to a suit by a broker in respect of such a claim against his principal that, so far as the defendant was concerned, he entered into the contracts as wagering transactions with the intention of paying the differences only, and that the plaintiff must have known of the inability of the defendant to complete the contracts by payment and delivery, having regard to his position and means. It must, further, be shown that the contracts which the plaintiff entered into with third persons on behalf of the defendant were wagering contracts as between the plaintiff and those third persons (t). It has also been held that a deposit paid on a wagering contract cannot be recovered in a case subject to the provisions of s 1 of the Bombay Act, whether the person suing is a winner or a loser in the transaction (u). Nor can such a deposit be recovered under s 65 of the Contract Act, 'for if the agreement was one merely to pay differences, its nature must necessarily have been known to the plaintiff and defendant at the time when they entered into it, and they must be presumed to have known also that it was void (v). An agreement to settle differences arising out of a nominal agreement for sale which was really a gamble is no less void than the original wagering transaction (u).

The result therefore is that though an agreement by way of wager is void, a contract collateral to it or in respect of a wagering agreement is not void except in the Bombay Presidency. The Calcutta High Court (x) has held that a hundi given to a bookmaker in consideration of his withdrawing the maker's name from the Calcutta Turf Club and so preventing the maker being posted as a defaulter was valid although the amount of the hundi was the same as that of the unpaid bet, but in Bombay such a hundi would be void. In England also before the enactment of the Gaming Act of 1892 (55 Vict c 9) agreements collateral to wagering contracts were not void. Thus in *Read v Anderson* (y) a betting agent at the request of the defendant made bets in his own name and on behalf of the defendant. After the bets were

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| <p>(t) <i>Perosha v Manekji</i> (1898) 2<sup>o</sup> Bom 899 907<br/> <i>Sassoon v Tokersey</i> (1904) 28 Bom 616</p> <p>(u) <i>Dayabhai Tribhorandas v Lalchand Panachand</i> (1885) 9 Bom 358<br/> <i>Pamchandra v Gangabison</i> (1910) 12 Bom L R 590</p> <p>(v) (1885) 9 Bom 358 at p 36<sup>o</sup><br/> <i>Jivanchand Cambhirmal v Lax</i></p> | <p><i>minarayan</i> (1905) 49 Bom 689 89 I C 885 A I R (1905) Bom 511</p> <p>(x) <i>Leicester &amp; Co v S P Mullick</i> (1922) 27 C W N 442 followed W<br/> <i>Banvard v M M Wodlia</i> (1928) 7 Ran 263 119 I C 215 A I R 1929 Rang 241</p> <p>(y) (1687) 13 Q B D 779</p> |
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## THE INDIAN CONTRACT ACT

made and lost the defendant revoked the authority to pay conferred upon the betting agent. Notwithstanding the revocation the agent paid the bets, and sued the defendant to recover the amounts thereof. It was held that the defendant having empowered the agent to bet in his name the authority was irrevocable, and that the agent was entitled to judgment. The statute of 1892 passed in consequence of this decision is almost to the same effect as the Bombay Act. It is interesting to note that the statute was not passed until twenty seven years after the Bombay Act. It may be hoped that in any future revision of the Contract Act the provisions of the Bombay Act will be incorporated in the present section so as to render the law uniform on this subject in the whole of British India.

**Speculative transactions**—Speculative transactions must be distinguished from agreements by way of wager. This distinction comes into prominence in a class of cases where the contracts are entered into through brokers. The *modus operandi* of the defendant in this class of cases is when he enters into a contract of purchase to sell again the same quantity deliverable at the same time in one or more contracts either to the original vendor or to some one else so as either to secure the profit or to ascertain the loss before the *aida* day, and when he enters into a contract of sale to purchase the same quantity before the *aida* day. This mode of dealing when the sale and purchase are to and from the same person has the effect of course of cancelling the contracts leaving only differences to be paid. When they are to different persons it puts the defendant in a position vicariously to perform his contracts. This is no doubt a highly speculative mode of transacting business, but the contracts are not wagering contracts unless it be the intention of both contracting parties at the time of entering into the contracts neither to call for nor give delivery from or to each other. There is no law against speculation as there is against gambling. ( ) It may well be that the defendant a speculator who never intended to give delivery, and even that the plaintiffs did not expect him to deliver but that does not convert a contract otherwise innocent into a wager. Speculation does not

( ) J. H. Todd & Lakshmidas (1892) 16 Bom 441 at pp 445-446. It forbids dealing between stock brokers who settle differences by way of wager. It is a regular course of business is periodical settlement of differences are not presumed to be wagering agreements. See also *Bhambhani v. C. 410 A. I. I. 107* Mal 73.

necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential (a) It is in cases of the above description that "there is a danger of confounding speculation or that which is properly described as gambling with agreements by way of wager but the distinction in the legal result is vital (b) This *modus operandi* was adopted by the defendant in *Tol v Lakhmidas* (c) where the dealings were in Broach cotton *Perosha v Manejji* (d) where the dealings were in Government paper and shares of a spinning and weaving company, and in *Sassoon v Tokersey* (e) where the dealings were in American futures In all these cases the contracts were entered into through a broker In the first of these cases the contracts were made by bought and sold notes so that the principals would not be brought into contact with each other until after the bought and sold notes were executed This would at once raise a presumption against the existence of a common intention to wager In the second and third cases the contracts were made by the broker with third persons in his own name on behalf of the defendant according to the practice of the trade Here the presumption against the existence of a common intention to wager is still stronger, for the defendant may not know at all with whom the broker had contracted on his behalf The broker may be a *sutta* broker or a mere agent for gambling but this fact is immaterial, for he is not a contracting party, and it is the intention of the contracting parties alone that is material in these cases (f) In each of the above cases it was contended for the defendant that the contracts sued upon were wagering contracts but in each it was held that though the transactions were of a highly speculative character, and though, so far as the defendant personally was concerned, he entered into the contracts as gambling transactions, there was no evidence

(a) *Blagovestov v Burjorji* (1917) L R 45 I A 29 33 42 Bom 373 44 I C 284 *Kanwar Bhan S Lha Vani v Garjat Rai Ravi Jivan* (1926) 7 Lah 442 94 I C 304, 4 I R 1076 Lah 318

(b) *Sassoon v Tokersey* (1904) 28 Bom 616 621

(c) (1892) 16 Bom 441

(d) (1898) 22 Bom 899

(e) (1904) 28 Bom 616

(f) *Perosha v Manejji* (1898) 22 Bom

899 907 *Sassoon v Tokersey* (1904) 28 Bom 616 624 The observation in the judgment in *Tol v Lakhmidas* 16 Bom at 1 446 that the broker there was not shown to be a *sutta* broker though no doubt a good many of the contracts he negotiated were settled by differences, does not imply that the decision would in any way have been affected if the broker had been proved to be a *sutta* broker

to show that the *other* contracting party had also the intention to gamble. “The Indian Contract Act in section 30 provides that agreements by way of wager are void, but that a transaction may fall within this provision of the law there must be at least two parties, the agreement between them must be by way of wager, and *both* sides must be parties to that wager (g). In the last two cases the suit was by the broker as plaintiff to recover from the defendant the loss paid by the plaintiff on behalf of the defendant.

**Oral evidence of agreement being by way of wager**—Though an agreement in writing may ostensibly be for the purchase and sale of goods deliverable on a certain day, oral evidence is admissible to prove that the intention of the parties was only to pay the difference, the burden of proof, of course, being on the party who alleges that it was a wager (h). Such ‘intention’ is a ‘fact’ within the meaning of s. 3 of the Evidence Act (see cl. 1, illustration (d)), and it may be proved by oral evidence under s. 92, proviso 1, of the same Act, as, if proved, it would invalidate the agreement under the provisions of the section now under consideration (i). The same principle has been reiterated in recent cases, following the English case of *Universal Stock Exchange, Ltd v Strachan* (j). Thus in a Bombay case (k) Tyabji J said: “In order to ascertain the real intention of the parties the Court must look at all the *surrounding circumstances*, and would even go behind a written provision of the contract to judge for itself whether such provision was inserted merely for the purpose of concealing the real nature of the transaction.” And in another Bombay case (l) Jenkins C J said: “The law says that we must find as best we can, the true intention of the parties, we must not take them at their written word, but we must probe among the surrounding circumstances to find out what they really meant. We are not, and we must not be, bound by the mere formal rectitude of the documents if in fact there lurks behind them the common intention to

(g) *Sassoon v Tokere*, (1904) 28 Bom 616 at p. 621.

(h) *Ga gadas v Jekisondas* (1923) 25 Bom L. R. 520. 73 I C 1072.

(i) *Anupchand Hemchand v Champas Ugerchand* (1898) 12 Bom 585, dissenting from *Juggernauth Sete Bux v Jam Dyal* (1883) 9 Cal 791. See also *Magan*

*bhai v Manchhabhai* (1866) 3 B H C O C 70.

(j) [1896] A C 166.

(k) *Jeroshi v Manaji* (1898) 22 Bom 899, 903.

(l) *Doshi Tulidasi v Shal Chiman Dasi* (1899) 24 Bom 227, 230.

wager, and parties cannot be allowed to obtain from the Courts any sanction for their wagers merely because they use a form which is not a true expression of their common purpose and intention. The [surrounding circumstances] and the *position of the parties* and the *history of dealings* of this class are legitimate, though not exclusive, matters for our investigation into the true intention of the parties." In a still later case (m) DAVAR J said: "What the Court has to do is not simply to look at the transactions as they appear on the face of them, but to go behind and beyond them, and ascertain the true nature of the dealings between the parties by probing into surrounding circumstances and minutely examining the position of the parties and the *general character of the business* carried on by them. In this class of suits it would be almost idle to expect to get at the truth unless the Court takes the widest possible outlook consistent with the provisions of the Indian Contract Act, otherwise the result would be that the statute could be violated with impunity by the simple and habitual device of cloaking wagers in the guise of contracts. (n) Thus the conduct of the parties in the matter of the transaction in question is relevant, for if no delivery is asked for or offered, the presumption is that the transaction was a wager on the rise or fall of the market. (o) In *Motilal v Govindram* (p), the fact that the plaintiff took the *panch* rate as the measure of his damages, and not the market rate, was held to be a plain indication that the parties never intended to give and take delivery. The means and ability of the parties to perform the contract in question are also relevant. (q) The general character of the plaintiff's business is also material for if it appears that the normal and regular course of the plaintiff's transaction was to pay and receive differences only, the presumption is that the transaction in question was merely a bargain for differences. This presumption was applied in a case where the plaintiff dealt in several lacs of Government paper and the evidence showed that he neither delivered nor received Government paper except on one single occasion just before he brought the suit. (r) It

(m) *Hurmukhrai v Narotandas* (1907) 9 Bom L R 125 at p 137

(n) Per Bachelor J in *Motilal v Govindram* (1906) 30 Bom 83 at p 99

(o) *Motilal v Govindram* (1906) 30 Bom 83 95 *Eshoor Doss v Venkata Subba Rao* (1895) 18 Mad 306 309

(p) (1906) 30 Bom 83 96

(q) *Kong Lee Lone & Co v Lo Jui Yanyee* (1901) 29 Cal 461 467 (foot)

469 *Kesar chand v Merwanjee* (1899) 1 Bom L R 263 264 *Perosha v Maekj* (1898) 2 Bom 899 907

(r) *Eshoor Doss v Venkata Subba Rao* (1895) 18 Mad 306 308 309

was also applied in a case where the plaintiff's transactions in linseed amounted to about 350 000 cwt in two years and the only linseed actually delivered during that period was 2,219 cwt, and that, too under exceptional circumstances (s). To determine the general character of the plaintiff's business, the Court ought to inquire how other contracts that may have been entered into by the plaintiff with the same defendant or even with third parties, and relating to the goods in question were previously performed by the plaintiff, whether by payment of differences or by delivery of goods. Thus where it appeared that at the *vaids* for which the contracts in question had been made the plaintiff had neither given nor taken any delivery of any cotton, it was held that the evidence tendered by the plaintiff to show that at *other vaids* he had given and taken delivery of cotton was admissible and that the lower Court was wrong in excluding this evidence (t). Upon the same principle, evidence is admissible to show that in the case of a particular class of contracts or of contracts relating to a particular commodity, the normal course of dealing is to pay differences only. Thus in *Motilal v Gorindram* (u) where the question was whether certain forward contracts between two Marwari firms for the sale and delivery of linseed were gambling transactions evidence was admitted which showed that contracts of similar form were commonly made in the Marwari bazar in Bombay in 1937 with no intention of giving or taking delivery of linseed but with the sole object of gambling in differences. This evidence was objected to on the ground that it was *res inter alios acta* but the objection was overruled Bachelor J observing 'In admitting this evidence as to the real character of precisely similar agreements made under the same conditions of time and place and circumstances I do not think that I am straining the provisions of the Evidence Act e.g. s 7 (v) and I may call in aid a passage from the judgment of Jenkins C J in *Doshi Talakhjis* case (w) there the learned Chief Justice in speaking of the surrounding circumstances of the agreements in that case says that these circumstances and the position of the parties and the history of dealing of this class are

(s) *Motilal v Gorindram* (1906) 30 Bom LR 7 (t) Facts which constitute the stat of the case and with which they (the parties) are concerned are relevant (u) (1899) 21 Bom LR 21 (v) (1899) 21 Bom LR 21

legitimate though not exclusive, matters for our investigation into the true intention of the parties' " In *Doshi Talakhshi's* case it will be remembered, the question was whether certain contracts entered into in Dholera for the sale of Broach cotton and the delivery thereof in Bombay were wagering contracts and evidence was admitted to show that, with one doubtful exception, no contracts similar to those in the suit were completed otherwise than by payment of differences. In *Sassoon v. Tokersey* (x) evidence was admitted which showed that under contracts for the sale and purchase of American cotton incorporating the rules of the Liverpool Cotton Association delivery does take place to a considerable extent.

**Wagering Policies**—The cases of life insurance and marine insurance afford illustrations of another variety of wagering contracts. In England a policy of insurance on the life of a person in which the insurer has no interest is void by 14 Geo. III c. 18. That Act forbids insurance "on the life or lives of any person or persons or on any other event or events whatsoever wherein the person or persons for whose use, benefit, or whose account such policy or policies shall be made shall have no interest or by way of wagering or gaming." This statute does not appear to apply to British India (y).

In *Alamai v. Positue Government Security Life Insurance Co* (z) the High Court of Bombay held that in India an insurance for a term of years on the life of a person in whom the insurer had no interest was void under this section. In that case the defendant company issued a policy for a term of 10 years for Rs. 25,000 on the life of Mehabub Bi, the wife of a clerk in the employ of the plaintiff's husband. About a week after Mehabub Bi assigned the policy to the plaintiff. Mehabub Bi died a month later, and the plaintiff as assignee of the policy sued to recover Rs. 25,000 from the defendants. It was held on the evidence that the policy was not effected by Mehabub Bi for her own use and benefit, but had been effected by the plaintiff's husband for his own use and benefit, and that it was void as a wagering transaction, he having no interest in the life of Mehabub Bi.

In a somewhat later Madras case (a) the plaintiff lent a sum of

(x) (1904) 28 Bom. 616, 624.

three volumes.

(y) It is not in the Collection of Statutes relating to India published by the Government of India in 1913—26 in

(z) (1898) 23 Bom. 191.

(a) *Iappakandu Marakayar v. Anna malis Chetti* (1901) 25 Mad. 561.

money to the defendants on the risk of a ship belonging to them. On 3rd August, 1896, the defendants passed a writing to the plaintiff which, after reciting the loan on the risk of the ship "now under sail to Nicobars" from Negapatam, provided for the payment by the defendants to the plaintiff on 20th March, 1897, of the loan, with interest thereon at the rate of 18 per cent per annum, if the ship returned safe to Negapatam after completion of her voyage, but that if she did not return the plaintiff lost his money. The ship had left Negapatam on 23rd July, 1896, and was lost at sea three days later. In a suit by the plaintiff to recover the amount of the loan on the ground that the ship was lost before the date of the agreement it was held that the agreement was by way of wager and void under this section. Davies J said that agreements similar to this were in vogue in England up to the time of the passing of 19 Geo II c 37 under the names sometimes of *foenus nauticum* and sometimes *usura maritima* but as they were considered to give an opening for usurious and gaming contracts, they were forbidden by that statute.

**Promissory note for debt due on a wagering contract**—Agreements by way of wager being void, no suit will lie on a promissory note for a debt due on a wagering contract. Such a note must be regarded "as made without consideration", for "a contract which is itself null and void cannot be treated as any consideration for a promissory note" (b).

**Suit to recover deposit**—The prohibition contained in this section as regards the recovery of money deposited pending the event of a bet applies only to the case of winners. The winner of a wager or a bet cannot sue to recover the amount deposited by the loser with the stake holder, but it is quite competent to the loser to recover back his deposit before the stake holder has paid it over to the winner (c). In

(b) *Trilam Damodhar v Lala Amr Chand* (1871) 8 B H C A A C 131. See also *Doshi Talakshi v Shah Ujamsi Jelsi* (1899) 24 Bom 227, *Perosha v Manekji* (1898) 22 Bom 899, *Aoig Lee Lone t Co v Lowjee Vanyee* (1901) 29 Cal 461, L R 28 I A 239. In England the law is complicated by a series of statutory provisions and various decisions thereon which have sometimes had unexpected

results. It seems better, on consideration to say nothing of them here.

(c) Of course not after payment. *Maung Po Hmein v Maung Aung Mya* (1920) 3 Ran 543, 93 I C 105, A I R 1926 Rang 48. *Patnakalli Curanna v Kachalipu Ippalanaidu* (1928) 107 I C 377, A I R 1928 Mal 434. We will the Court discuss the correctness of the summary decision.

a case, however, governed by the provisions of Bombay Act III of 1865, even a loser cannot recover back the deposit (d)

**Lotteries**—S 291A of the Indian Penal Code makes it penal to keep any office or place for the purpose of drawing any lottery not authorised by Government or to publish any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person on any event or contingency relative or applicable to the drawing of any ticket, lot, number, or figure in any such lottery

Before the enactment of this section of the Code, lotteries not authorised by Government were prohibited in India by Act V of 1814. The Act declares all such lotteries "common and public nuisances and against law". The Act was repealed by the Penal Code Amendment Act XXVII of 1870, and in its place s 291A was inserted in the Code (see s 10 of the amending Act)

Where a particular association is authorised by the Government of India by a letter to hold a lottery, the effect is that no prosecution would lie under the criminal law. But a sale or purchase of a ticket in such a lottery will still be a wagering contract under this section as well as under the Bombay Act, for the Government cannot by a letter overrule the Imperial Act or the Acts of the local Legislature (e)

*What is a Lottery?*—Lotteries ordinarily understood are games of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the person concerned is made wholly dependent upon the drawing or casting of lots, and the necessary effect of which is to beget a spirit of speculation and gaming that is often productive of serious evils. It was so stated in a Madras case (f) where an agreement was entered into between twenty persons whereby it was provided that each should subscribe Rs 200 by monthly instalments of Rs 10, and that each in his turn as determined by lot should take the whole of the subscriptions for one month. The defendant contributed Rs 10 every month for a period of ten months, and in the tenth month he got his lot of Rs 200. Thereupon a bond was taken from him by the plaintiff, who was the agent in the business for the remain

(d) *Ramchandra v Gangabison* (1910) 12 Bom L R 590, *Dayabhai Tribhovan das v Lakhmichand Panachand* (1885) 9 Bom 358. English decisions to the same effect are collected in *Burge v Ashley and Smith* [1900] 1 Q B 744

(e) *Dorabji Tata v Bance* (1918) 42 Bom 676, 41 I C 869. The lottery in this case was a War Loan lottery

(f) *Kamakshi Achari v Apparu Pillai* (1863) 1 M H C 448

31. *ing Rs 100 in order to ensure the future regular payment of monthly instalments for the further period of ten months. In a suit upon the bond it was contended that the transaction was illegal as being a lottery within the meaning of Act V of 1844, and that the suit therefore could not be maintained. It was held that the transaction did not amount to a lottery. The Court said: "Here no such lottery appears to have taken place. It is not the case of a few out of a number of subscribers obtaining prizes by lot. By the arrangement all got a return of the amount of their contribution. It is simply a loan of the common fund to each subscriber in turn, and neither the right of the subscribers to the return of their contributions nor to a loan of the fund is made a matter of risk or speculation. No loss appears to be necessarily hazarded nor any gain made a matter of chance." A "club fund" plan under which all subscribers are repaid their capital by a fixed date, though some determined by lot get more and sooner, is not a lottery (g)*

## CHAPTER III.

### OF CONTINGENT CONTRACTS

- 31.—A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen
- \* Contingent contract defined

#### *Illustration*

A contracts to pay B Rs 10,000 if B's house is burnt. This is a contingent contract

**Of the section in general.**—This short chapter of the Act appears to be the original work of the legislative department. There are some clauses on the subject in the draft prepared in England, but their language is quite different. We do not know why the word 'contingent,' familiar to English lawyers only in the law of real property, was preferred to 'conditional.' A promise is said to be absolute or unconditional when the promisor binds himself to performance in any event, conditional when performance is due only on the happening of some uncertain event in the future, or if some state of facts not

(g) *Narayana Iyyengar v Vellichamy Ambalim* (1927) 50 Mad 604, 103 F C 318; A I R 1927 Mad 583

within the promisor's knowledge now exists. Some learned authors extend the name of conditional to promises to be performed only after a lapse of time (h) but this with great respect seems not correct for the lapse of time cannot be regarded as uncertain or contingent. Some deny it to contracts dependent on the present existence of unknown facts but this also seems untenable. An unknown present fact is as uncertain for the contracting parties as any future event (i).

In the text of the Act the words 'some event collateral to such contract' are not very clear. They seem on the whole to mean that the event is neither a performance directly promised as part of the contract nor the whole of the consideration for a promise. Thus if I offer a reward for the recovery of lost goods there is not a contingent contract, there is no contract at all unless and until some one acting on the offer, finds the goods and brings them to me. So if I tell B I will pay him Rs 1 000 if he marries C, this is not a contingent contract but merely an offer which will become a contract if without any revocation of it in the meantime, B does marry C. and therefore illustration (c) to s 32, and the illustration to s 31 below must be read as implying that the agreement is made for some present and independent consideration. Again, a contract to pay a man for a piece of work is very commonly made on the terms that he is to have no pay till the work is all done, but the completion of the work being the very thing contracted for, is not collateral to the contract and the contract is not properly said to be contingent though the performance of the work may be and often is a condition precedent to the payment of the wages.

The illustration to the section is the ordinary one of a contract of fire insurance. All contracts of insurance and indemnity are obviously contingent. So are many other kinds of contracts in both great and small matters. A wager is a contingent agreement but s 30 prevents it from being a contract. A contract between A and Z that if A succeeds in his suit with regard to certain land in the possession of Z he shall purchase the land from Z for Rs 300 is contingent (j). This however, is not the common type of contract. A contract to supply a

(h) See Leake on Contracts Part III 304 3 9

chap II p 461 7th ed

(j) *Is al v Da ibkas* (1900) 2 Bo

( ) See Holmes The Common Law 118

man, in return for a fixed payment, with extracts of newspaper articles or paragraphs relating to a given subject which may appear during a given time is contingent, for the duty arises only if and when such matter is published in one of the journals contemplated by the parties. Here the contingent events do not in any necessary or probable way depend on the promisor's will, but in many cases—as, for example, a sale on approval—the contingency may depend on an act of discretion to be exercised by him.

**Contingency dependent on act of party.**—The distinction just now mentioned requires some further explanation. Words of promise amount to no promise at all if their operation is expressed to be dependent, in terms or effect, on the mere will and pleasure of the promisor, as if a man says that for a certain service he will pay whatever he himself thinks right or reasonable (*l*). But the operation of a promise may well be dependent on a voluntary act other than the mere declaration of the promisor's will to be bound. The act may be that of a third person, thus a promise to pay what A shall determine is perfectly good. The fact may also be that of the promisor himself, so long as it is not an act of mere arbitrary choice whether he will be bound or not, as in the common case of goods being sold on approval, where the sale is not completed until the buyer has either approved the goods or kept them beyond the time allowed for trial (*l*). So, in the case of goods to be manufactured to order, it may be a term of the contract that the work shall be done to the customer's approval, and then the customer's judgment, acting "*bona fide* and not capriciously," is decisive (*m*). On the same principle, if a clause in a contract provides that a party's disability to perform his promise shall be a cause for annulling the contract but shall give no remedy in damages this does not apply to a disability brought about by the promisor's own conduct (*n*). A builder's right to recover for his work is often made conditional on the architect certifying that the work has in fact been done and properly done, and such a condition is good (*o*).

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|---|---|
| ( <i>l</i> ) <i>Roberts v Smith</i> (1879) 4 H & N 315, 118 R R 462       | <i>ateliers et chantiers de France</i> [1919] A C 1                               |
| ( <i>l</i> ) <i>Flycatch v Barnes</i> (1880) 5 C 1 D 321                  | <i>Chunsiel Impôts et Co v</i>  |
| ( <i>m</i> ) <i>Andresen v Belfield</i> (1877) 2 C B N S 779, 109 P R 887 | <i>Imperial Bank of India v C</i> (1901) 46 Bora 808, 67 I C 223, <i>Chesil v</i> |
| ( <i>n</i> ) <i>New Zealand C v Société les</i>                           | <i>Chesil v</i> <i>Union v S</i> (1901) 21 B m 1 R 877, 75 I C 233                |
|   | ( <i>o</i> ) <i>Morgan v Borne</i> (1833) 9 B .                                   |

Payment of a policy of insurance may be conditional on proof of the claim satisfactory to the directors of the insurance company being furnished, this means such proof as they may reasonably require (p)

The English authorities were considered, and the principle applied by the High Court of Madras in *Secretary of State for India v Arathoon* (q) The plaintiff had entered into a contract to supply Government with a certain quantity of timber One of the terms of the contract was that the timber should be of unexceptionable quality and should be liable to be rejected if not approved by the Superintendent of the Gun Carriage Factory, for which it was required The timber tendered was not approved by the Superintendent, and was accordingly rejected The plaintiff sued for breach of the contract, contending that the timber which he tendered answered the description in the contract It was not alleged that the Superintendent failed to exercise a judgment in regard to the suitability of the wood The lower Court held that, the Superintendent being substantially a party, his judgment could not be regarded as conclusive, and that it was open to the plaintiff to show that his tender ought to have been accepted, but the Madras High Court reversed this decision holding that it was not open to the plaintiff to question the reasonableness of the Superintendent's disapproval Innes, Offg C J said "The rule of the Civil Law that a condition the happening of which is at the will of the party making it is null and void as being destructive of the contract (Dig XLV Tit 1, 108) probably relates to [cases] where the promisor is not bound to exercise a discretion as a promise by one to give 'if I am so minded' for sales and other contracts on a condition the happening of which was entirely subject to the result of a mental process of discrimination on the part of one party were undoubtedly recognised as valid (See Dig XVIII Tit 1 *De Contrahenda Emtione* see also Pothier, Part I chap 1 art iii s 7) At all events it is not a rule of the Indian law of contracts, and it may be doubted if it is a rule of the English law" If this means that the Common Law will give effect to a merely illusory promise, it is not correct, but that which "is not a

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672 35 R R 65 *Clarke v Watson* (q) (1879) 5 Mad 173 Here as too  
 (1865) 18 C B N S 978 144 R R 491 frequently in India failure to report the  
 (p) *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782, 124 argument has made the judgments  
 R R 745 obscure

rule of the Indian law of contracts" seems to be the Civil Law not as the learned Judge himself thought it was, but as some one else had suggested. There does not appear to be any real difference here between English and Roman law (r)

Conversely the operation of penal clauses in a contract may be made to depend not only on some default of one party, but on the decision of a person appointed by the other party that a default contemplated by the contract has taken place. In *Aghore Nath Bannerjee v Calcutta Tramways Co, Ltd* (s), a conductor on taking service with the defendant company deposited a sum of money with them as security for the performance of his duties subject to the condition that the deposit should be forfeited if there was any dereliction of duty on his part, as to which the certificate of the company's manager was to be conclusive. In a suit by the conductor to recover the amount of his deposit the Court held that he was bound by the certificate of the manager, and that the manager was no more the company than the engineer or architect who is constituted the arbitrator, under a contract for works, to settle disputes as to extras or penalties, is identical with the person or body for whom the work is done. The case, however, was argued and decided on s 28

In some kinds of contracts, especially for the sale or letting of immovable property, clauses are commonly inserted expressly giving one or both of the parties an option to rescind the contract in specified events. In such cases, and in other cases where there is a complete and active obligation from the first, though subject to be defeated by matter subsequent, it does not seem that the contract can properly be called contingent

### 32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened

Enforcement of contracts contingent on an event happening

If the event becomes impossible such contracts become void.

(r) Muttusami Ayyar J in his follow-  
ing judgment, quoted a not very clear  
illustration as from Windschied's Pan-  
decten, which we have been unable to

identify in that author's text.

(s) (1885) 11 Cal 232, cit 1 in the  
commentary on s 24 p 227 and

*Illustrations\**

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

There are some cases which may be dealt with either under this section or s. 56, for it may be equally true to say that performance of a material part of the contract has become impossible, and that the contract was made on the contingency of an event which has become impossible, or it may be hard at first sight, at any rate, to say which section is the more applicable. See notes on s. 56, p. 327 *sqq.*, below, and *Krell v. Henry* (t), where a contract to hire the use of a room in London to view the intended coronation procession of June, 1902, was held, in effect, to be conditional on the procession taking place.

Whether a contract is of the kind specified in this section may be a question of fact or construction. In one case where this section was relied upon the Judicial Committee held on the construction of the document that it operated as an unconditional undertaking on the defendant's part to procure a loan and out of the loan to repay the money due to the plaintiff (u).

### 33.—Contingent contracts to do or not to do anything

Enforcement of contracts contingent on an event not happening

if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before

*Illustration*

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

### 34.—If the future event on which a contract is con-

When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person

tingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impos-

(t) [1903] 2 K. B. 740

(u) *Lissansji Sons & Co v. Shapurji*, (1912) 36 Bom. 387, L. R. 39 I. A. 152

35. sible that he should so act within any definite time, or otherwise than under further contingencies

*Illustration*

A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible although it is possible that D may die and that C may afterwards marry B.

Sections 32 and 33 cannot be made plainer by any commentary. Sec. 34 is in accordance with very old English authority. A man who has contracted to sell and convey a piece of land to A on a certain date breaks his contract by conveying it to Z before that date, though he might possibly get the land back in the meantime (v). English cases on conditional gifts in wills ought not to be cited in this connection, the rules applicable to the construction of wills being in some respects peculiar. The illustration to the section, in which it must be assumed that A's agreement is made for some distinct consideration, as otherwise it would be merely a proposal, may therefore be taken as declaring the common law. The application of the present section, or any section in this group, must obviously depend on the special facts and the construction of the contract (w).

35.—Contingent contracts to do or not to do anything if

When contracts become void which are contingent on happening of specified event within fixed time

a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible

comes impossible

Contingent contracts to do or not to do anything if a

When contracts may be enforced which are contingent on specified event not happening within fixed time

specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that

such event will not happen

*Illustrations*

(a) A

a year

and becomes void if the ship is burnt within the year

(v) Choke J., 1 B 211; 11 V. 52; pl. 26. 4-2, 50 F. C. 438, A. I. R. 1914 All 688

(w) Jaipur & Co. v. Govt. of India, 6 All. 27; All. I. 1604

(1) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

**36.—**Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Agreements contingent on impossible events void

*Illustrations*

(a) A agrees to pay B 1 000 rupees if two straight lines should enclose a space. The agreement is void (x).

(b) A agrees to pay B 1 000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

The two last foregoing sections explain themselves. Before leaving this chapter we may note that somewhat similar provisions as to transfers of property made subject to conditions occur in the Transfer of Property Act, 1882, see especially ss 25—34. A conditional transfer of property, though it may be, and often is, made in pursuance of a contract, is not, of course, itself a contract. It was therefore necessary to lay down distinct and independent, though more or less analogous, rules for such transactions (y).

## CHAPTER IV

### OF THE PERFORMANCE OF CONTRACTS

#### *Contracts which must be performed*

**37.—**The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in

(x) This does not seem a very happy illustration in the light of modern geometry, not to say that geometrical relations have nothing to do with time.

(1925) 27 Bom L R 1246, 91 I C 330, A I R 1926 Bom 107 (question whether conveyance was conditional sale or mortgage) has anything to do with the Contract Act.

(y) *Qu* whether e.g. *Aerath v Chimbai*

case of the death of such promisors before performance unless a contrary intention appears from the contract.

#### *Illustrations*

(a) A promises to deliver goods to B on a certain day on payment of Rs 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

**Performance and discharge.**—A contract, being an agreement enforceable by law (s 2, p 13, above) creates a legal obligation, which subsists until discharged. Performance of the promise or promises remaining to be performed is the principal and most usual mode of discharge, but there are several others. Accordingly the usual method of approved text writers is to make the discharge of contract a main head of the subject, and treat of performance and other ways of discharge, such as agreement of the parties, breach of the contract, and operation of law, under distinct chapters or subdivisions, as may be seen in the works of the late Mr Leake and of Sir W Anson. This Act, for some reason which does not appear, has made "The Performance of Contracts" the principal title, with the somewhat curious result of including under it a group of sections (62—67) on "Contracts which need not be performed." Whatever may be the merits of this innovation, elegance is not one of them. It is sufficient for practical purposes, however, if the law is intelligently stated in some kind of coherent order. The sections 51—58) on the Performance of Reciprocal Promises really belong to the head of Interpretation, which is not separately dealt with by the Act.

This section has some resemblance to a clause of the original draft (cf 30), which, however, seems rather intended to define what performance is sufficient than to lay down any duty of performance in general. As to performance by an agent, see s 40, below. The rule of the Common Law which is here affirmed in the second paragraph was stated in England in 1869 by Willes J, a judge of very great learning and authority. "Generally speaking, contracts bind the executor or administrator, though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant the death of either party puts an

and to the relation (c), as in respect of a wife after the death the contract is dissolved and there be a stipulation expressed or implied to the contrary (d).

Such personal contracts as are here mentioned extend as they only illustrate (f) to the present section to contracts involving special personal consideration or the exercise of special skill (cp. s. 40 p. 291 below). They do not extend to mere exercise of ordinary discretion. The executor of a man who has ordered goods deliverable by instalments under a continuing contract may be held to accept the remaining instalments if it be the duty or discretion of seeing that the goods supplied are according to contract does not require any personal qualification (g). And generally the Court will not invent exceptions to the general rule which are not expressed or apparent from the nature of the contract.

**Succession to benefit of contract.**—Neither the present section nor anything else in the Act lays down any rule as to the manner in which or the extent to which persons other than the original promisee may become entitled to enforce a promise.

Generally the representatives of a deceased promisee may enforce subsisting contracts with him for the benefit of his estate. It is no real exception to this rule that in some cases the nature of the contract is in itself or may be made by the intention of the parties such that the obligation is determined by the death of the promisee. The most obvious example is the contract to marry in the Common Law. Another more seeming than real exception is where performance by the other party is conditional on some performance by the deceased which was not completed in his lifetime and is of such a personal character that performance by his representatives cannot be equivalent. An architect's executor, for example, cannot insist on completing an unfinished design even if he is a skilled architect himself and accordingly he cannot fulfil the conditions on which payment or further payment as the case may be, would have become due. But a builder's executors may be entitled and bound to perform his contracts

(1) The use of 'relationship' as equivalent to 'relation' in this sense has been common for several years but is improper. Willes J would certainly not have approved it.

(a) *Farrone v Hilton* 1 R 4 C P 744 746.

(b) *Wentworth v Cox* (1831) 10 A & E 42 50 R R 316.

not impose any condition "The creditor has only to say, 'I take the money, protest as much as you please,' and neither party makes any admission" (h) A tender of debt before the due date is not a valid tender, and will not prevent interest from running on the loan (i)

There are hardly any (j) recent English cases on tender of money debts, and the habits of modern business appear to have greatly diminished the importance of the subject (k)

**Able and willing**—Sub sec (2) provides that the tender must be made under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do A tender of money in payment must be made with an actual production of the money (l) But when the creditor is dead, and no probate has been obtained by the executors of the deceased, an offer by letter to pay the debt, on a proper release being executed, is a valid tender, provided the debtor was able to pay the debt, and had money available for that purpose No actual production of money is necessary in such a case, there being no person entitled in law to receive the payment The rule that nothing but actual tender will stop interest applies only in those cases where there has been some one to whom interest could be tendered either as the creditor himself or one who had established his right to be the representative of a deceased person (m) A plea of tender before action must be accompanied by a payment into Court after

(h) *Scott v Uxbridge and Rickmansworth R Co* (1866) L R 1 C P 596 599, per Willes J

(i) *Eshahug Wolla v Abdul Bari Haldar* (1904) 31 Cal 183

(j) In *Rourke v Robinson* [1911] 1 Ch 480 the only question was whether a mortgagee was bound on being paid off to hand over a reconveyance as well as the title deeds and the Court thought it needless to decide but if necessary would have decided, that a tender of the full sum due coupled with demand of something which the creditor is bound by law to perform on being paid is conditional See also *Landrang Dadabhoi* (1902) 2

(k) As to tender preventing an act of bankruptcy, see *Ex parte Danks* (1852) 2 D M & G 936, 95 R R 376

(l) A mere offer by post to pay the amount due is not a valid tender See *rayya v Sirayya* (1914) 27 Mad L J 482, 26 I C 121 Similarly, where a contract is to be performed by the execution and delivery of a document a mere offer by post to execute the document without having the document

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action, otherwise the tender is ineffectual (n) The following is the form of the plea of tender: "As to the whole (or as to Rs . . . , part of the money claimed) the defendant made tender before suit of Rs . . . , and has paid the sum into Court" See Code of Civil Procedure, 1908, O 21, rr 13, and Schedule I, Appendix A, "Written Statements," Form No 4

Where a contract for the purchase and sale of Government paper provides for the delivery of the paper to the defendant, it is not necessary that the plaintiff should have taken the Government paper contracted for to the place of business of the defendant and then and there made an actual tender of it If the plaintiff was ready and willing to perform his part of the contract and did his best to inform the defendant by going to his place of business that he was so, that would be sufficient, in the absence of evidence to the contrary, to constitute readiness and willingness (o) Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares, and the issue as to readiness and willingness is in such a case immaterial (p) Where the plaintiff agreed to manufacture chairs for a railway company, and after parts had been delivered the company gave orders to the plaintiff not to make and send any more, it was held that the plaintiff was entitled to recover without actually making and tendering the remainder of the goods (q) As to repudiation of a contract by one party before the time for performance, see farther on, s 39, p 280 below See also notes to s 51 "Readiness and willingness"

**Tender of instalments**—A lender is entitled to decline, in the absence of any agreement as to repayment of the loan, to receive

(n) *Haji Abdul Rahman v Haji Noor Mahomed* (1891) 16 Bom 141, at pp 149—150, *Sabapathy v Janmahalinga* (1915) 38 Mad 959, at p 970, *Rakhal Chandra v Baikuntha Nath* (1928) 117 I C 687, 32 C W N 1082, A I R 1928 Cal 874

(o) *Juggernath Sew Bux v Ram Dyal* (1883) 9 Cal 791

(p) *Dayabhai Dipchand v Maniklal*

*Vrighhulan* (1871) 8 B H C A C 123 See also *Dayabhai Dipchand v Dulla bhram Dayaram* (1871) 8 B H C A C 133

(q) *Cort v Ambergate Railway Company* 17 Q B 127 The measure of damages in such a case would ordinarily be the difference between the cost of production and delivery and the contract price

payment of the sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time (r). But when payment of money or delivery of goods in instalments is provided for by the contract a tender of instalments is a good tender. In a case which arose in Calcutta a contract made between the plaintiff and the defendant stipulated for delivery to the defendant of 7,500 bags of Madras coast castor seed which were to be shipped per "steamers," and then stated that shipment of 2,500 bags was to be made in December. Of these, 1,690 bags arrived on 12th December, and the plaintiff offered delivery thereof to the defendant who refused to take them on the ground that he was not bound to take less than the whole of the 2,500 bags at one time. The bags were thereupon resold by the plaintiff. The remaining 810 bags being the balance of the December shipment arrived on 19th December, but were refused by the defendant on the same ground as before, and those also were accordingly resold by the plaintiff. The plaintiff sued the defendant for damages for breach of the contract in not accepting the bags. The Court held without difficulty that there was a legal and proper tender of the December shipment by the plaintiff according to the terms of the contract (s).

**Reasonable opportunity**—A tender of goods must be so made that the person to whom the goods are offered has a reasonable time to ascertain that the goods offered are goods of the quality contracted for. A tender made at such a late hour of the appointed day that the buyer has not time to inspect them is not good (t). In a Bombay case (u), the defendant agreed to purchase from the plaintiff 100 bales "fully good fair Kishli cotton," to be delivered from 15th March to 1st April, 1881. On 30th March the plaintiffs sent the defendant a letter enclosing a sampling order, which was received by the defendant's agent at 11 30 a.m. that day. The defendant got samples taken of the cotton, and a dispute having arisen as to the quality and classification of the cotton, the plaintiffs wrote to the defendant on 31st March asking him to attend with his surveyor at 1 p.m. on that day to survey

(r) *Behari Lal v. Pam Ghulam* (1902) 21 All 461

(s) *Simsion v. Gora Chandi Doss* (1883) 9 Cal 473. *Prandi v. Lawrence* (1870) 1 Q. B. Div. 344 which the Court cited

and followed was a similar case

(t) *Startup v. Macdonald* (1813) 1

Man & G 593, 61 R. 1 810

(u) *Pulchney v. Jamsalji* (1887) 6 Bom 692

the cotton, as otherwise an *ex parte* survey would be held. It being a mail day, the defendant's surveyor could not attend at the appointed hour, and the plaintiffs had an *ex parte* survey held by their own surveyors, and they pronounced the cotton to be of the description contracted for. Shortly afterwards the defendant asked for a survey by a letter which reached the plaintiffs at 2 19 p m on that day. The plaintiffs did not comply with the application, and called upon the defendant to take delivery of the goods. In a suit by the plaintiffs for damages for breach of the contract it was contended for the defendant that no reasonable opportunity was afforded to the defendant to examine the goods, as there was no joint survey, and that the time allowed by the plaintiffs for the examination of the cotton was not sufficient. It was held that the defendant had reasonable opportunity within the meaning of this section. Latham J said "The rule in the 38th section of the Contract Act agrees with the rule of English law laid down in Benjamin on Sales (2nd ed pp 573 and 576) (v), but there is little authority as to what is a reasonable opportunity of inspection (w).

In the present case the sampling order was delivered to the defendant by 11 30 a m on the 30th March, and he had till 1 p m on the 31st March before any refusal by the plaintiffs to allow a further examination is alleged. Now Vizbhookands Atmaram seems to have been certainly dilatory in his examination, he not having compared the samples with the standards till past noon on the 31st, and it seems to me that a period of over twenty four hours gave a reasonable opportunity to see whether the cotton offered was the cotton which the plaintiffs were bound by their contract to deliver.

"Then are we to go further and to say that the purchaser is entitled to continue inspecting and examining until the expiration of the period for delivery? I find no authority for this and in many cases it would be unreasonable to place no limit on the inspection. Is a purchaser at liberty to open and taste every bottle of wine in a lot sold, or in the present case to pass every pound of cotton through an

(v) 842 sqq 6th ed

(w) *Jsherwood v Whitmore* (1843) 11 M & W 347 63 R R 624 seems to be the only case in point. A tender of goods does not mean a delivery or offer of packages containing them but an offer of those packages under such

circumstances that the person who is to pay for the goods shall have an opportunity afforded him before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained" per Parke B

expert's hands? There must be some limit, and I think that a reasonable opportunity is the limit alike for vendor and purchaser, and that such a reasonable opportunity had been had by 1 p m on the 31st March "

Reasonable opportunity of inspection is all that the Act requires it is the receiving party's business to verify, not the delivering party's to supply further proof that the goods are according to contract The goods need not be in the delivering party's actual possession, control is enough (x)

**Tender of money** —A creditor is not bound to accept a cheque, but if a cheque is tendered and received, and the creditor or his agent objects only to the amount, or makes no immediate objection at all, he cannot afterwards object to the nature of the tender Downright refusal by the creditor to accept payment at all precludes any subsequent objection to the form of the tender (y)

The landlord of a house, through his agent, sent in rent bills to his lessee The lessee gave the agent a cheque in favour of her attorney for the amount demanded and obtained a receipt from him The landlord's agent then took the cheque to the lessee's attorney, who cashed it and handed the amount to the agent, and requested him to get the rent bills receipted and returned to him The landlord's solicitor, to whom the money was taken refused to accept it, and the money was then returned to the lessee's attorney In a suit by the landlord for the rent, it was held that under the circumstances the tender amounted to payment, and the suit was dismissed with costs (z)

**Legal tender** —The money tendered must be current coin of the country As to tender of coinage, see the Indian Coinage Act III of 1906, ss 11 to 15, and as to tender of currency notes, see the Paper Currency Act II of 1910, s 15

Where a loan to a mortgagor was made of Rs 150 in the Poona currency which is equivalent to Rs 435 2 0 of the British currency the mortgagee cannot claim Rs 450 in the British currency, and the

(x) *Arunachalam Chettiar v Krishna Ayyar* (1905) 49 Ma I L J 530, 90 I C 481 A I R 1925 Mad 1168

(y) *Venkatrama Ayyar v Gopala Krishna Pillai* (1929) 52 Mad 322 116

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(z) *Polye Chund King v Monland* (1879) 4 Cal 572 Cf *Jones v Arltor* (1840) 59 R R 833; 8 Dowl Pr Ca 442

mortgagor is entitled to redeem on payment of Rs 135 2 0 in the British currency (a)

**Offer to one of several joint promisees**—A tender of rent by a lessee to one of several joint lessors (b) and of a mortgage debt by a mortgagor to one of several mortgagees (c) would be a valid tender under this section

**Validity of discharge by one of several joint promisees**—In *Barber Maran v Ramana* (d), it was held by the High Court of Madras that this section does not make it incumbent on the debtor to satisfy all the joint promisees before obtaining a complete discharge, and therefore a release of a mortgagor by one of two mortgagees on payment to him of the mortgage debt discharges the mortgagor as against the other mortgagee. This decision was based upon the English case of *Wallace v Helsall* (e) decided long before the Contract Act and upon the last paragraph of s 38, which provides that "an offer to one of several joint promisees has the same legal consequences as an offer to all of them". The correctness of this decision was doubted later by the same Court (f) and also by the High Courts of Bombay (g) and Calcutta (h). One reason for this was the decision of Farwell J in *Powell v Brodhurst* (i) which has considerably shaken the authority of *Wallace v Helsall*. Later still (j), however, a Full Bench of the

(a) *Trimbal v Sallaram* (1891) 16 Bom 599

(b) *Krishnarav v Manaji* (1874) 11 B H C 106 where it was held that payment of rent by a lessee to one of several joint lessors discharges the debt as to all. But payment to a partner in fraud of his co partners is not a valid discharge. *Chinnaramanuja Iyyangar v Padmanbha Pillayan* (1896) 19 Mad 471

(c) See *Barber Maran v Ramana Goundan* (1897) 20 Mad 461 where it was held relying upon this section principally that payment of the amount due on a mortgage by a mortgagor to one of several mortgagees discharges the mortgage debt as to all

(d) (1897) 20 Mad 461. See *Shrinivasdas v Meherbai* (1917) 41 Bom 300 L R 44 I A 36 39 I C 627,

where the question was one of title to immovable property

(e) (1840) 7 M & W 264 261 I 707

(f) *Isa Bibi v Abdul Kader* (1901) 20 Mad 26 at pp 38—39. *Ranawaj v Munniyandi* (1910) 20 Mad L J 709. *Sheik Ibrahim v Iana Ijar* (1911) 30 Mad 680 687

(g) *Sitaram v Sitarhar* (1903) 27 Bom 290 294

(h) *Jagat Tarini v Vaba Gopal* (1907) 34 Cal 305 at pp 300—301. *Hossainara v Rahimannessa* (1910) 38 Cal 342 at pp 349—350

(i) [1901] 2 Ch 160

(j) *Annapurnamma v Allkaja* (1913) 36 Mad 544 nothing short of actual payment will do. see *Pamasami v Chandra Kotajya* (1924) 48 Mad 693 80 L C 297

Madras High Court (White C J dissenting), approved of the decision in *Barber Maran v Ramana*, and held that one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees (4). It was observed that there was no distinction as regards the question of discharge between claims under a mortgage bond and those under a negotiable instrument. Referring to the last paragraph of s 38, Sankaran Nair J said "It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it. It seems clear that if the promisor was entitled to offer payment to one of the promisees which the latter was entitled to accept, the promisor cannot be held to be liable to pay over again to the other promisees what he has already paid. The payment therefore must be treated as a complete discharge." (5). As to *Wallace v Helsall* Sudhina Ayyar J said that it was decided in 1840 and was good law when the Indian Contract Act was passed in 1872 that Act following the principles of the English decision. On the other hand, White C J in delivering his dissenting judgment said, "It (s 38) provides in effect that all the joint promisees get the benefit of the legal consequences whatever those consequences may be, of an offer, or a tender, to one of them. The section does not deal with the legal consequences of an accepted tender, or of an accepted offer of performance, but with the legal consequences where a tender or offer has been made and the tender or offer has not been accepted. No doubt the last paragraph of the section is general and not restricted to an offer which has not been accepted but apparently the Legislature was not contemplating the legal consequences of an offer which had been accepted but the legal consequences of an offer which had been refused. I do not think we can infer from this enactment that the Legislature intended to lay down by implication the acceptance of payment by one of several promisees operated as a discharge of the claims of the others. On the other hand as it seems to me now, s 45 which deals with the devolution of rights where a person has made a promise to two or more persons jointly throws very little, if any, light on the question which we have to decide. If we are unable to find an answer to the question within the four corners of the Contract Act we have to look to the general law

(4) See Negotiable Instruments Act 1881 ss 8 and 147.

(5) 31 M.L.J. at p 612.

and to see whether the rule of law as laid down in *Wallace v Kelsall* applies or whether the rule or rather the presumption of equity on which *Steeds v Steeds (m)* was decided is to prevail. I think the equitable presumption applies and I do not think this presumption is negatived by the provisions of the Contract Act" (n). The opinion of White C J was adopted by a Full Bench of the Chief Court of the Punjab (o), and also the Calcutta High Court, now followed by the Patna High Court after a contrary decision (p), has taken the same view (q).

We agree with the dissenting opinion of White C J so far as concerns the present section. Tender of a money debt does not discharge the debt (a point surely not irrelevant), the material section of the Contract Act, as regards the right to give a discharge in the name of joint debtors, is not s 38 but s 45. It must not be overlooked that in English law the rule that payment to one of joint creditors is a good discharge is still the general rule (r).

In any case a payment to one of several joint creditors does not operate as a payment to them all where the payment is fraudulently made to him and not for the benefit of them all (s).

The principle of the decision in *Barber Maran v Ramana (ss)* applies only where there are two or more joint promisees. It does not apply to the case of co heirs who are not joint promisees, but the heirs of a single promisee, and a release therefore of the debtor by one of the heirs of the deceased creditor on payment to him of the amount due on the bond is not a valid discharge to the debtor (t). Nor does that principle apply when a debt, though due to a joint Hindu family, stands in the name of one member. In such a case he is the person *prima facie* entitled to realise it, and a payment made to him is a

(m) (1899) 22 Q B D 537

(n) 36 Mad at pp 545—546

(o) *Mathra Das v Azam Din* (1917) Punj Rec, no 68 p 252, 41 I C 921

(p) *Parbhu Ram v Jhalo Kuer* (1917) 2 Pat L J 590, 42 I C 408. *Syed Abbas Ali v Misra Lall* (1920) 5 Pat L J 376, 56 I C 403. See also *Banamali Satpathe v Talna Pambar Patra* (1920) 5 Pat L J 151, 55 I C 841

(q) *Sheikh Hakim v Adwasta Chandra Das Dalal* (1918) 22 C W N 1021 49 I C 63

(r) *Iowell v Brodhurst* [1901] 2 Ch at p 164 the question that matters as there pointed out, is whether the debt is really joint

(s) *Sheik Ibrahim v Rama Aiyar* (1911) 35 Mad 685

(ss) (1897) 20 Mad 461

(t) *Ahinsa Bibi v Abdul Kader* (1901) 25 Mad 26. *Sitaram v Shridhar* (1903) 27 Bom 292. *Ramasamy v Muniswami* (1910) 20 Mad L J 709, at pp 715—716. *Ankalamma v Bellam Chenchayya* (1918) 34 Mad L J 315, 45 I C 419

Madras High Court (White C J dissenting), approved of the decision in *Barber Maran v Ramana*, and held that one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees (k). It was observed that there was no distinction as regards the question of discharge between claims under a mortgage bond and those under a negotiable instrument. Referring to the last paragraph of s 38, Sankaran Nair J said: "It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it. It seems clear that if the promisor was entitled to offer payment to one of the promisees which the latter was entitled to accept, the promisor cannot be held to be liable to pay over again to the other promisees what he has already paid. The payment therefore must be treated as a complete discharge." (l). As to *Wallace v Kelsall*, Sadasiva Ayyar J said that it was decided in 1840 and was good law when the Indian Contract Act was passed in 1872 that Act following the principles of the English decision. On the other hand, White C J in delivering his dissenting judgment said, "It (s 38) provides in effect that all the joint promisees get the benefit of the legal consequences whatever those consequences may be, of an offer, or a tender, to one of them. The section does not deal with the legal consequences of an accepted tender, or of an accepted offer of performance, but with the legal consequences where a tender or offer has been made and the tender or offer has not been accepted. No doubt the last paragraph of the section is general and not restricted to an offer which has not been accepted, but apparently the Legislature was not contemplating the legal consequences of an offer which had been accepted but the legal consequences of an offer which had been refused. I do not think we can infer from this enactment that the Legislature intended to lay down by implication the acceptance of payment by one of several promisors operated as a discharge of the claims of the others. On the other hand as it seems to me now s 15 which deals with the devolution of rights where a person has made a promise to two or more persons 'jointly' throws very little if any light on the question which we have to decide. If we are unable to find an answer to the question within the four corners of the Contract Act, we have to look to the general law

(k) See Negotiable Instruments Act 1881 ss 74 and 115.  
(l) 30 Mad at 549.

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(n) 36 Mad at pp 515—546

(o) *Mathra Das v Aiza n Din* (1917) Punj Rec no 68 p 252 41 I C 901

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valid discharge of the debt; if the payment is made to any other member of the family it does not operate as a discharge unless there be circumstances justifying the payment (u) Where a bond is passed to the manager of a joint Hindu family, payment made to a junior member of the family during the lifetime of the manager does not discharge the promisor from his liability under the bond (v)

39.—When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence (w) in its continuance.

*Illustrations*

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance On the sixth night A wilfully absents herself from the theatre B is at liberty to put an end to the contract

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night On the sixth night A wilfully absents herself With the assent of B, A sings on the seventh night B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night

**Refusal to perform contract.**—It is not easy to see why this section is placed here The subject matter would seem really to belong to the category of contracts, not which must, but which need not, be performed, dealt with in ss 62-67, pp 317-381 below Further, it is closely connected with the consequences of breach of contract laid down in Chap. VI. However, a commentator must take the Act as he finds it

As correctly laid down in the High Court of Calcutta when the Act was still recent, "this section only means to enact what was the law in England and the law here before the Act was passed, viz, that where a party to a contract refuses altogether to perform or is disabled from performing his part of it the other side has a right to rescind

(u) *Iyengar v Chellu v. Manikka Mudali* (1879) 9 Mad L J 153, *Adilnath v Chellu v. Manikka* (1879) 22 Mad 328

(v) *Andanamma v. Chenchayya* (1918) 41 Mad 163

(w) See *Boulton Bros & Co v New Victoria Mills Co* (1925) 119 I C 637, 644, 29 All L J 1119, A L R 1925 All 87 (but there was no thing amounting to a refusal)

it" (x) English authorities are collected in the notes to *Cutter v Powell* in Smith's Leading Cases (y)

The words used by Garth C.J. "where a party to a contract refuses altogether to perform his part of it," clear up a slight verbal ambiguity in the Act where the words 'his promise in its entirety' mean the substance of the promise taken as a whole. In one sense, refusal to perform any part of a contract, however small, is a refusal to perform the contract "in its entirety", but the kind of refusal contemplated by this enactment is one which affects a vital part of the contract, and prevents the promisee from getting in substance what he bargained for.

The clearest leading case is perhaps *Withers v Reynolds* (z). The action was for not delivering straw to the plaintiff under an agreement whereby the defendant was to supply the plaintiff with straw from October, 1829, to Midsummer, 1830, in specified quantities, and the plaintiff was to pay a named sum per load "for each load of straw so delivered," which the Court read as meaning that he was to pay for each load on delivery. In January, 1830 the straw having been regularly sent in, and the plaintiff being in arrear with his payments, "the defendant called upon him for the amount, and he thereupon tendered to the defendant £11 11s, being the price of all the straw delivered except the last load, saying that he should always keep one load in hand." The defendant took this payment under protest and refused to deliver any more straw unless it was paid for on delivery. The Court held that this gave the plaintiff no right of action in other words that the defendant was entitled to put an end to the contract. As Parke J. (as he was then, afterwards better known as Baron Parke), said, "the substance of the agreement was that the straw should be paid for on delivery. When, therefore, the plaintiff said that he would not pay on delivery (as he did, in substance, when he insisted on

(x) Per Garth C.J. in *Sooltan Chund v Schiller* (1878) 4 Cal 252 255. The present section is often referred to it is submitted not correctly, in cases where there is no refusal at all, but only the failure in performance of reciprocal promises dealt with by s. 54 p. 390 below. For example *Bishunath Kunwar v Sheo Bahadur Singh* (1927) 104 I C 587 A I R 1927 Oudh 265. As to

what amounts to repudiation cp *Obla A. Subbar v Venkatachalapathi Ayyar* (1925) 91 I C 580 A I R 1925 Mad 1290.

(y) This note, however, is hardly intelligible without some familiarity with the old common law system of pleading.

(z) (1831) 2 B & Ad 882, 36 R R 782.

9. valid discharge of the debt, if the payment is made to any other member of the family it does not operate as a discharge unless there be circumstances justifying the payment (u) Where a bond is passed to the manager of a joint Hindu family, payment made to a junior member of the family during the lifetime of the manager does not discharge the promisor from his liability under the bond (v)

39.—When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence (w) in its continuance

Effect of refusal of party to perform promise wholly

#### Illustrations

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

**Refusal to perform contract**—It is not easy to see why this section is placed here. The subject matter would seem really to belong to the category of contracts, not which must, but which need not, be performed, dealt with in ss 62–67, pp 317–381 below. Further, it is closely connected with the consequences of breach of contract laid down in Chap VI. However, a commentator must take the Act as he finds it.

As correctly laid down in the High Court of Calcutta when the Act was still recent, “this section only means to enact what was the law in England and the law here before the Act was passed, viz, that where a party to a contract refuses altogether to perform or is disabled from performing his part of it the other side has a right to rescind

(u) *Tamasani Chetti v Manikka Mudali* (1899) 9 Mad L J 155. *Addikkalam Chetti v Marimuthu* (1899) 22 Mad 326.

(v) *Anjalamma v Chenchayya* (1918) 41 Mad 637.

(w) *See Boulton Bros & Co v New Victoria Mills Co* (1928) 110 I C 837, 844, 26 All L J 1110. *A I R 1929 All 87* (but there was nothing amounting to a refusal).

it" (x). English authorities are collected in the notes to *Cutter v. Powell* in Smith's Leading Cases (y).

The words used by Garth C.J. "where a party to a contract refuses altogether to perform . . . his part of it," clear up a slight verbal ambiguity in the Act, where the words "his promise in its entirety" mean the substance of the promise taken as a whole. In one sense, refusal to perform any part of a contract, however small, is a refusal to perform the contract "in its entirety"; but the kind of refusal contemplated by this enactment is one which affects a vital part of the contract, and prevents the promisee from getting in substance what he bargained for.

The clearest leading case is perhaps *Wuthers v. Reynolds* (z). The action was for not delivering straw to the plaintiff under an agreement whereby the defendant was to supply the plaintiff with straw from October, 1829, to Midsummer, 1830, in specified quantities, and the plaintiff was to pay a named sum per load "for each load of straw so delivered," which the Court read as meaning that he was to pay for each load on delivery. In January, 1830, the straw having been regularly sent in, and the plaintiff being in arrear with his payments, "the defendant called upon him for the amount, and he thereupon tendered to the defendant £11 11s, being the price of all the straw delivered except the last load, saying that he should always keep one load in hand." The defendant took this payment under protest, and refused to deliver any more straw unless it was paid for on delivery. The Court held that this gave the plaintiff no right of action, in other words that the defendant was entitled to put an end to the contract. As Parke J. (as he was then, afterwards better known as Baron Parke), said, "the substance of the agreement was that the straw should be paid for on delivery. . . . When, therefore, the plaintiff said that he would not pay on delivery (as he did, in substance, when he insisted on

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keeping one load in hand), the defendant was not obliged to go on supplying him " It is to be observed that, as Patteson J added, "if the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw " Later English authorities have in fact established that mere failure to make one of a series of payments will not generally, in the absence of a prospective refusal, discharge the other party from proceeding with the contract (a)

As to failure in performing other particular terms of a contract, no positive general rule can be laid down as to its effect The question is in every case whether the conduct of the party in default is such as to amount to an abandonment of the contract or a refusal to perform it, or, having regard to the circumstances and the nature of the transaction, to "evince an intention not to be bound by the contract " (b) It seems, however, with great submission, that the intention which is material is not that with which the contract is broken, but that with which it was made Parties can undoubtedly make any term essential or non essential, they can provide that failure to perform it shall discharge the other party from any further duty of performance on his part, or shall not so discharge him, but shall only entitle him to compensation in damages for the particular breach Omission to make the intention clear in this respect is the cause of the difficulties, often considerable, which the Courts have to overcome in this class of cases

In *Sooltan Chund v Schuller* (c) the defendants agreed to deliver to the plaintiffs 200 tons of linseed at a certain price in April and May, the terms as to payment being cash on delivery Certain deliveries were made by the defendants between the 1st and 8th of May, and a sum of Rs 1,000 was paid on account by the plaintiffs, which left a large

(a) *Freeth v Burr* (1874) L R 9 C P 208, *Finch Sel Ca* 714, *Mersey Steel and Iron Co v Naylor, Den-on & Co* (1884) 9 App Ca 434 These cases were determined after the passing of the Indian Contract Act, but the views of the learned judges are useful guides in determining what amounts to a refusal in cases of this kind per MacL in C J in *Lash Behary Shaha v Aruttya Gopal Aundj* (1906) 33 Cal 177 at p 481

(b) L R 9 C P 213 214, and see *Pollock on Contract*, 286-292

(c) (1878) 4 Cal 252, *Burn & Co v Thakur Saleb Sree Lakh Irjee* (1923) 28 C W N 104, 83 I C 260 a case on rather similar lines, *Simson v Lajpat* (1886) 9 Mad 359, *Polkari Bros v Putna Velu Chetti* (1891) 18 Mad 63, *Sunil Singh v Krishna Mills Co, Ltd* (1914) Punj Rec no 63 p 211, 27 I C 91

balance due to the defendants in respect of linseed already delivered. This balance was not paid, and the defendants thereupon wrote to the plaintiffs cancelling the contract and refusing to make further deliveries under it. The plaintiffs answered expressing their willingness to pay on adjustment of a sum which they claimed for excess refection and an allowance for some empty bags. The defendants stated that they would make no further delivery, and the plaintiffs thereupon bought in other linseed and sued the defendants for damages for non-delivery of the remaining linseed. Upon these facts it was held, following *Freeth v Burr* (d) that there was no refusal on the part of the plaintiffs to pay for the linseed delivered to them, as they were willing to pay the sum due as soon as their cross claims were adjusted. As to illustration (b) to the section it was said, "That illustration is perhaps not a happy one, because it may lead, as I think it has led in this instance, to misapprehension. But the difference between that case and this is clear enough. The singer by wilfully absenting herself, though on one night only, did in fact refuse altogether to perform an integral and essential part of her contract. By doing so she put it out of her power to perform her contract in its entirety. But here the plaintiffs have never refused to perform any part of their contract. They were willing to pay the sum due as soon as their cross claims were adjusted, and their default consisted in not paying for the linseed on delivery" (e).

It may be further observed, with regard to the illustrations, that it would be rash to extend them. In England it has been held that a singer engaged to perform in concerts as well as in operas who has agreed, amongst other things to be in London six days before the beginning of his engagement for the purpose of rehearsals does not, merely by failing to be in London at the time so named, entitle the manager to put an end to the contract (f). Wrongful dismissal of an employee has, on the other hand, been held to determine not only the contract of service, but a term restraining the employee from carrying on the same business after its termination (g). In reading the illustrations to the Act, so far as they bear on questions of construction, it must be assumed that there are not any terms beyond those

(d) L R 9 C P 208

183 Finch Sel Ca 742

(e) Per Garth C J, 4 Cal at p 256

(g) *General Billposting Co v Atkinson*

(f) *Bettins v Gye* (1876) 1 Q B D [1909] A C 118



expiration of the time for delivering the goods. It cannot be regarded as giving an immediate right of action unless, of course, the purchaser thereupon exercises his option to treat the contract as rescinded, when he may go into the market and supply himself with similar goods, and sue upon the contract at once for any damage then sustained. The law on this subject will be found in *Leigh v Paterson* (y) and *Phillpotts v Evans* (z), the authority of which cases was upheld in *Hochster v De la Tour* (a).

The last-mentioned case is now generally treated as the leading one on "anticipatory breach of contract" (b). The rule shortly indicated by this phrase is that on the promisor's repudiation of the contract, even before the time for performance has arrived, the promisee may at his option treat the repudiation as an immediate breach, putting an end to the contract for the future and giving the promisee a right of action for damages. It must be remembered that the option is entirely with the promisee.

A few months before the Contract Act came into force the effects of "anticipatory breach" were thus summed up in the Exchequer Chamber in England (c) —

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non performance but in that case he keeps the contract alive for the

(y) (1818) 8 Taunt 540, 20 R R 552

(z) (1839) 5 M & W 475, 52 R R 802

It is difficult to understand how the learned Chief Justice supposed this case to anticipate the doctrine of *Hochster v De la Tour*, to which the judgment of Parke B is distinctly adverse but this is of only historical interest

(a) (1853) 2 E & B 678, 90 R R 747 and see *Ripley v McClure* (1849) 4 Fx 345, 359, 80 R R 593, 604. The rule in *Hochster v De la Tour* is now generally received in America, and has been approved and applied by the Supreme Court of the United States *Poehm v Horst* (1900) 178 U S 1

(b) This expression is considered unfortunate by Lord Wrenbury, *Bradley v*

*H Newson, &c* [1919] A C 16 53

the breach is in the present repudiation *Cp* per Lord Haldane at p 33

(c) *Frost v Knight* (1872) 1 L 7 Lx 111. The judgment delivered by Cockburn C J is practically though not formally, the judgment of the Court see L R 7 Fx at p 118. The actual points decided were that the rule applies to contingent promises, and that the contract to marry is not excepted from it on any such grounds of its special character as were suggested in the Court below. See also *Synge v Synge* (note (n), p 285 above) where, however, it was not necessary to rely on the principle to its full extent

benefit of the other party as well as his own, he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it

“ On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss ” See notes to illustration (h) to section 73, p 411 below When the promisee has so determined his choice, then, whether he sues for damages or not, it is not open to the promisor to go back on his refusal and treat the contract as subsisting (d)

It may be worth while to add that an unsuccessful attempt to perform a contract which does not disable the promisor from still performing it effectually within the time limited, or a reasonable time, and does not cause any damage to the promisee, cannot be treated as a refusal Such an attempt does not of itself affect the legal rights of the parties at all (e)

The election of the plaintiff to treat repudiation of the contract as an immediate breach does not affect the measure of damages

These authorities have been followed in British India Where, according to the custom of the caste to which the plaintiff and the defendant belonged, marriages ordinarily took place when the bride was between twelve and fifteen years of age, and the plaintiff, who was betrothed to the defendant's daughter, required the defendant to fix a date for his marriage within a certain period, after which the marriage could not take place for eighteen months, owing to the intervention of the *Sinhasth* year, and the girl would then have passed her

(d) *Jhadoo Mal jagan Nath v Phul Chand Fateh Chand* (1924) 5 Lah 497 85 I C 118 A I R 1925 Lah 217 (the only difficulty was on the construc

tion of the correspondence)

(e) See *Borrowman v Free* (1878) 4 Q B Div 500

fifteenth year, it was held that the declaration by the girl that she was unwilling to be married for three or four years, and by the father that he could not compel her to change her mind, was practically a repudiation of the contract of marriage, and entitled the plaintiff to damages for the breach (*f*)

**Contract of service**—The illustrations to the section are both examples of contracts of service. In *Hochster v De la Tour* (*g*) the defendant engaged the plaintiff as his courier on a Continental tour from June 1 for three months certain at £10 a month. Before that day came the defendant changed his mind and wrote to the plaintiff that he did not want him. The plaintiff, without waiting further and before June 1, sued the defendant for breach of contract. For the defendant it was argued that the plaintiff should have waited till June 1 before bringing his action, on the ground that the contract could not be considered to be broken till then. It was held, however, that the contract had been broken by express renunciation, and the plaintiff was not bound to wait until the day of performance. The principles enunciated in this case and the others underlying the present section were applied by the High Court of Bombay in a case where a station-master in the employ of a railway company, alleging that he had resigned the service of the company, claimed his share of the company's provident fund, but the claim was resisted on the ground that he was dismissed from service, and that he was not therefore entitled, under the rules of the fund, to more than the amount of his subscriptions thereto. One of the questions was whether the notice of dismissal having regard to the date on which it was given, operated as a dismissal of the plaintiff. The plaintiff had on February 14 gone on three months' leave without pay. On May 5 he tendered his resignation to the defendant company. On May 13 the company wrote to the defendant that he was dismissed from service. It was contended that there was no such dismissal as disentitled the plaintiff to his full share of the fund, first, because he had previously tendered his resignation, and, secondly, because the notice of dismissal was given on May 13, that is, before he became liable to resume his duties, which was on

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(*f*) *Purshotamdas Tribhovandas v Purshotamdas Mangaldas* (1897) 21 Bom 23 35. For the form of the decree in such cases see *ib* p 37, following *Umed Kika v Nagindas* (1870) 7 B H C 122 (*g*) (1853) 2 E & B 678, 95 R R 747

the 14th Both these contentions were overruled As to the first contention it was said that, there being no contract between the parties that the service should terminate on resignation, the resignation did not operate to determine the contract unless it was assented to by the other side As to the other contention it was said: "His (plaintiff's) letter of the 5th day of May was an intimation of his intention not to perform the services to which he was bound The company only took him at his word and it seems to me that there was on the 13th an *anticipatory breach* which in the events entitled them to determine the contract by dismissing the plaintiff" (h)

Where a servant or a clerk who is engaged by the month leaves his employer's service wrongfully in the course of the then current month, he is not entitled to any salary for the broken portion of the month in the course of which he left the service (i) But where the engagement is for one full year, say from 1st April, 1908, to 31st March, 1909, and the salary is fixed at so much (say Rs 18) per month, and the servant wrongfully leaves his employer's service on 20th March, 1909, he is nevertheless entitled to his salary for the eleven months during which he actually served his employer, less the damages incurred by the employer by the breach, though the salary be payable under the terms of the agreement in a lump sum of Rs 216 at the end of the year It was so held by the High Court of Madras, the Court observing that the case was governed by the present section and s 64, and that ill (c) to s 65 was almost conclusive in plaintiff's favour (j)

**Measure of damages.**—The measure of damages for "anticipatory breach" is not necessarily the same as it would be for a failure or refusal occurring at the time when performance was due (k) The

(h) *Ganesh Ramchandra v G I P Ry Co* (1900) 2 Bom L R 790 This appears a strange decision, for if the resignation was inoperative there was no breach at all There might have been if the plaintiff had said 'I shall not return to your service, whether you accept my resignation or not'

(i) *Pamji v Little* (1873) 10 Bom H C 67, *Dhume v Setenoaks* (1886) 13 Cal 80, *Lall Bros v Ambika Prasad* (1913) 35 All 132 But see *Raghoonnath*

*Doss v Halle* (1871) 16 W R 60 See also *Empress of India Cotton Mills Co v Naffer Chunder Poy* (1898) 2 C W N 687, and *Aryodaya Spg & Hg Co, Ltd v Siva Merchant* (1911) 13 Bom L R 19, cases decided with reference to the special terms of the contract

(j) *Chokalinga v Mahomed* (1912) 23 Mad L J 680

(k) *Millett v Van Heek & Co* (1921) 2 K B 369, C A, see further at p 412 below

plaintiff is entitled to measure his damages as they stand at the date of repudiation : *Ramgopal v. Dhanji Jadhanji Bhatia* (11).

**Insolvency of promisor.**—This is not of itself equivalent to a total refusal to perform the contract, though it may be accompanied by conduct which amounts to a notice of the insolvent debtor's or his representative's intention not to pay his debts or perform his contracts. A seller, however, is not bound to go on delivering goods to an insolvent buyer (1). The proofs and illustrations belong to the special subject of Sale of Goods, now to be dealt with in a separate volume.

### *By whom Contracts must be Performed.*

40.—If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases the promisor or his representatives may employ a competent person to perform it.

#### *Illustrations.*

(a) A. promises to pay B. a sum of money. A may perform this promise either by personally paying the money to B or by causing it to be paid to B by another, and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A. promises to paint a picture for B. A must perform this promise personally.

**Personal contracts.**—Contracts involving the exercise of personal skill and taste, or otherwise founded on special personal confidence between the parties, cannot be performed by deputy. But it is not always easy to say whether a particular contract is, in this sense, personal or not, or what is an adequate performance of a personal contract. The hiring of a carriage from Sharpe, a coachmaker trading under his own name alone, but in fact with a partner, was held to be a personal contract, which the hirer was not bound to go on with after Sharpe had retired from business. "He may have been induced to enter into the contract by reason of the confidence he reposed in Sharpe,

(11) (1925) 1 R. 55 1 A 200, 111 (1) *Ex parte Chalmers* (1873) L. R. 8 1 C 480, 41 R 1928 P C 200 Ch 200.

and at all events had a right to his services in the execution of it " (m) This has been considered an extreme application of the principle (n), which ought to be applied only where the contract really and substantially has relation to the personal conduct of the contracting party (o) A contract for personal agency or other service entered into with partners is generally determined by the death of a partner, or it may be more accurate to say that it is not held to continue with the surviving partner unless there is something to show a distinct intention to that effect (p) On the other hand, a contract with a firm which has nothing really personal about it so far as regards the partners, for example, a contract to perform at a music hall belonging to the firm, is not generally determined by the death of one member of the firm, especially if the individual members of the firm were not named in the contract and not known to the other party (q) Every case must really be judged on its own circumstances

The illustrations to the section look obvious enough But the second is not quite so simple as it looks Suppose A is not a painter, but a sculptor Must A chisel the whole of his statue in the marble with his own hand, or, if the statue is to be in bronze, must he cast it himself? According to all modern usage, he is clearly not bound to do so, he is expected to design and supervise the work, but the manual execution will be done, subject to the master's final touches, by skilled workmen Benvenuto Cellini cast his own Perseus, Sir Hamo Thornycroft did not cast his own King Alfred Again, A is a painter commissioned to carry out a great mural decoration Must he actually hold the brush that lays on every square inch of paint? Certainly that was not the understanding of the great European painters of the sixteenth and seventeenth centuries and their patrons, the less important parts of the work were executed by pupils and assistants under the master's direction, and it would have been impossible to get the work

(m) *Robson v Drummond* (1831) 2 B & Ad 303, 36 R R 569 572

(n) *British Waggon Co v Lea & Co* (1880) 1 Q B D 149 152

(o) *Phillips v Alhambra Palace Co* [1901] 1 K B 59

(p) *Tasker v Shepherd* (1861) 6 H & N 575, 123 R R 69

(q) *Phillips v Alhambra Palace Co*

[1901] 1 K B 59 The defendants were undisclosed partners trading under a quasi corporate name, the plaintiffs were a troupe of performers but nothing turns on their number If one of the plaintiffs had died the case would have been different as they had undertaken active and personal performances

done otherwise Still the master was bound to perform his promise personally in the sense that he could not delegate the design or general supervision to a junior In ascertaining what is contemplated by the parties, usage as well as the express terms must be regarded

Ordinary contracts for delivery of goods, payment for them and the like, may of course be performed by deputy (r) "There is clearly no personal element in the payment of the price" (s) See notes to s 37, pp 259—268 above

41.—When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor

Effect of accepting performance from third person

There is English authority to the effect that discharge of a contract by a third person is effectual only if authorised or ratified by the debtor, but it is not clear that the better modern opinion is not the other way (t) In India there is no occasion to discuss the point, as the words of the Act leave no room for doubt It need hardly be added that this section applies only when a contract has in fact been performed by a third person (u) Cp the Negotiable Instruments Act, 1881, s 113

42.—When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise

Devolution of joint liabilities

This is a deliberate variation of the Common Law rule In England "upon the death of one of several joint contractors the legal liability under the contract devolves on the survivors, and the

(r) *Tod v Lakhmidas* (1892) 16 Bom 441 451 but authority is really need less even if illustration (a) did not cover it followed *Jaman v Changi* (1905) 49 Bom 862, 27 Bom L R 1261 91 I C 360, A I R 1926 Bom 97

(s) *Tolhurst v Associated Portland Cement Manufacturers* [1902] 2 K B 660 672 per Collins MR

(t) See Leake 684 7th ed Pollock 498

(u) *Har Chand Lal v Sheoraj Singh* (1917) 39 All 178, L R 44 I A 60, 39 I C 343

3. representative of the deceased cannot be sued at law either alone or jointly with the survivors. Consequently the whole legal liability ultimately devolves upon the last surviving contractor, and after his death upon his representatives" (v). Limited exceptions have been introduced by Courts of Equity, and in particular a deceased partner's estate is liable, subject to the prior payment of his separate debts, for the unsatisfied debts of the firm (w). Parties can, of course, make their contracts what they please; but the presumption established for British India by the present section appears to be more in accordance with modern mercantile usage.

43.—When two or more persons make a joint promise (x), the promisee may, in the absence of express agreement to the contrary, compel any one or more (y) of such joint promisors to perform the whole of the promise.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

*Explanation.*—Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal

(v) Leake, 303.

(w) Partnership Act, 1890, s. 9, following the decision of the House of Lords in *Kendall v. Hamilton* (1879) 4 App. Cas. 604, before which partnership debts were generally supposed to be joint and several for all purposes.

(x) This means what it says. Co-heirs of a mortgagor are not joint promisors, and some of them cannot be sued for the whole debt. *Hazara Singh v. Naranjan*

*Singh* (1929) 119 I. C. 419; A. I. R. 1929 Lah. 782.

(y) The words "or more" have been inserted by the Repealing and Amending Act (XII of 1891). It has been found necessary to lay down that if one of two parties to an alleged joint promise turns out not to have agreed to it at all, the other who did contract is not released. *Sanjole v. Baderlad* (1923) 89 I. C. 976, A. I. R. 1923 Nag. 196.

to recover anything from the surety on account of payments made by the principal.

*Illustrations*

(a) A, B, and C jointly promise to pay D 3 000 rupees. D may compel either A or B or C to pay him 3 000 rupees.

(b) A, B, and C jointly promise to pay D the sum of 3 000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

(c) A, B, and C are under a joint promise to pay D 3 000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d) A, B, and C are under a joint promise to pay D 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

**Joint promisors.**—The series of sections now before us materially varies the rules of the Common Law as to the devolution of the benefit of and liability on joint contracts (c). As far as the liability under a contract is concerned, it appears to make all joint contracts joint and several (a). It allows a promisee to sue such one or more of several joint promisors as he chooses, and excludes the right of a joint promisor to be sued along with his co promisors (b). Here the minority of one joint promisor does not affect the liability of the other (c). There is still considerable difference of opinion in the Indian High Courts as to its consequential operation where a judgment has been obtained against some or one of joint promisors, and the decisions must be examined. We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining unsatisfied, ought not, in British India, to be held a bar to a subsequent action against the other promisor or promisors.

**Effect of decree against some only of joint promisors.**—In *Hemendro Coomar Mullick v Rajendrolall Moonshee* (d) the High Court of Calcutta

(z) *Lakmidas Khimji v Purshotam Rajendrolall Moonshee* (1878) 3 Cal 353, 360. *Mulammad Ashari v Radhe Ram*

(a) *Motilal Bechardass v Ghellabhai Singh* (1900) 22 All 307 315. *Dick v*

*Harisram* (1892) 17 Bom 6, 11, *Bishunath Dhunji Jaittha* (1901) 25 Bom 378, 380.

*Sahay v Nanku Prasad Singh* (1923) 2 L R 43 I A 99, 39 Mad 409, *Sain Das*

*Pat 416, Raghunath Das v Baleshwar Prasad* (1927) 7 Pat 353, 105 I C 484, *v Ram Chand* (1923) 4 Lah 324, 85 I C

9 P L T 137, A I R 1927 Pat 426 701, A I R 1924 Lah 146

(b) *Hemendro Coomar Mullick v.*

(d) (1878) 3 Cal 353

held, following the rule laid down in *King v Hoare* (e), that a decree obtained against one of several joint makers of a promissory note is a bar to a subsequent suit against others. This was followed by the High Court of Madras in a similar case in *Gurusami Chetti v Samurti Chinna* (f). Strachey C J dissented from these decisions in *Muhamad Askari v Radhe Ram Singh* (g). In that case the question was whether a judgment obtained against some of several mortgagors and remaining unsatisfied against them was a bar to a second suit against other joint mortgagors, and the Court held that it did not constitute any bar and that a second suit was maintainable the doctrine of *King v Hoare* (h) not being applicable in India, at all events in the Mufassal, since the passing of the Indian Contract Act. Strachey C J said "My objections to the application of the doctrine are based on purely legal grounds. The doctrine now rests not so much on *King v Hoare* (1844) 13 M & W 494, as on the judgments of the Law Lords in *Hendall v Hamilton* (1879) 4 App Ca 504. As explained in those judgments the doctrine that there is in the case of a joint contract a single cause of action which can only be once sued on is essentially based on the right of joint debtors in England to have all their co contractors joined as defendants in any suit to enforce the joint obligation. That right was in England enforceable before the Judicature Acts by means of a plea in abatement and since the Judicature Acts by an application for joinder which is determined on the same principles as those on which the plea in abatement would formerly have been dealt with. In India that right of joint debtors has been expressly excluded by s 43 of the Contract Act and therefore, the basis of the doctrine being absent the doctrine itself is inapplicable. *Cessante ratione legis, cessat ipsa lex*."

The reasoning of Strachey C J seems to us conclusive, but until it has been adopted by the other High Courts, or confirmed by the Judicial Committee of the Privy Council, the point must be regarded as open. The Madras High Court, in later cases seems inclined to adopt the opinion expressed in the first paragraph of the commentary on this section (i).

(e) (1844) 13 M & W 494, 67 R R 694

(h) (1844) 13 M & W 494, 67 R R 694

(f) (1881) 5 Mad 37

(i) *Mool Chand v Alwar Chetty* (1916)

(g) (1900) 22 All 307. See also *Abdul Azi v Basdeo Singh* (1912) 34 All 601, 606, 17 I C. 89

30 Mad 548 551-552, 29 I C 303  
*Pamanjula v Aravam* 1: (1909) 33 Mad 317, 319-321

Coming next to the High Court of Bombay, the doctrine of *King v Hoare* was assumed to be applicable to India by that Court in *Lakmidas Khimji v Purshotam Haridas* (j), and in *Lakshmilankar v Ishnuram* (k). In the latter case it was held that the principle of *King v Hoare* did not apply to the facts of the case, as the decree in the first suit against one of the partners, which was set up as a bar to a subsequent suit against all the partners, was made by the Civil Court of Baroda, which had no jurisdiction over some of the partners who resided in British territory. On the other hand, there is a dictum of Farran J in *Motilal v Ghellabhai* (l) that the present section appears to make all contracts joint and several. The applicability to India of the rule in *King v Hoare* was again considered by the same Court in *Dick v Dhunji Jaittha* (m) but the point was not decided, as the Court thought it did not arise directly for decision. In a case (n) where the question was whether the plaintiff having sued an agent to judgment was entitled under s. 233 (below) subsequently to maintain a suit against the principal, Macleod J. expressed his dissent both from the reasoning and the decision of Strachey C.J. in *Muhammad Askari's* case, and held that the present section merely took away the right of a joint promisor to have his co promisor joined with him in the action, and did not enable the promisee to file separate actions against both. "It could not have been intended," said the learned Judge, "to deprive the second co contractor of his right to plead the previous judgment, or to split up one cause of action into as many causes of action as there were joint contractors." This view was soon afterwards adopted by Kajji J. (o). We still agree with Strachey C.J.

Judgment against one joint promisor who admits claim after institution of suit does not bar the suit against other joint promisors. In the last mentioned case the plaintiff sued the defendants alleging that they were partners, and at the hearing one of the defendants admitted the plaintiff's claim and judgment was thereupon passed against him for the amount claimed. On behalf of the other defendants

(j) (1882) 6 Bom 700

(k) (1899) 24 Bom 77

(l) (1892) 17 Bom 6 11. See also *Govind v Sakharam* (1904) 28 Bom 383

(m) (1901) 25 Bom 378

(n) *Shulal v Birdichand* (1917) 19 Bom L R 370 377—380, 40 I C 194

(o) *Markandras v Virendras* (1917) 19 Bom L R 837 843 42 I C 815

it was contended that, the cause of action alleged in the plaint being joint, it merged in the judgment recovered against the first defendant, and that further proceedings in the suit were therefore barred. The Court did not accede to this contention, and it was held that the judgment recovered against the first defendant did not bar further prosecution of the suit against the others. Reference was made in the course of the judgment to s 153 of the Code of Civil Procedure, 1882 (now O 15, r 2, Code of Civil Procedure, 1908). As to *King v Hoare*, it was stated that the rule there laid down did not apply to the facts of the case under consideration.

**Suit against one of several partners.**—In *Lakmidas Khimji v. Purshotam Haridas (p)* it was held in a suit brought upon a contract made by a partnership firm that a plaintiff may select as defendants those partners of the firm against whom he wishes to proceed. This decision was cited with approval by Farran C J in *Motilal Bechardass v Ghellabhai Hariram (q)* and was followed by the High Court of Madras in *Narayana Chetti v Lakshmana Chetti (r)*, where it was held in a similar case that according to the law declared in s 43 of the Contract Act, especially when taken with s 29 of the Code of Civil Procedure (s), it is not incumbent on a person dealing with partners to make them all defendants, and that he is at liberty to sue any one partner as he may choose. It will be noted in this case that the Court expressly applied to partners not only s 43 of the Contract Act, but also s 29

(p) (1882) 6 Bom 700

(q) (1892) 17 Bom 6, 11. In that case Farran C J observed that ss 42, 43, and 45 related to partners as well as to other co contractors, and that if the Legislature had intended to except partners from the provisions of this section it would have done so in express words. See, however, *Laksmishankar v Lishnuram* (1899) 24 Bom 77, where the Court held, without any reference to the earlier case, that the liability of partners was joint, and that no one partner could change it into a joint and several liability without the consent of the other partners.

(r) (1897) 21 Mad 256. See also (1878) 3 Cal 353 359 360 and (1900) 22 All

307, 315, *Ajja Dada Patil v Jari Krishna Lasudku* (1930) 51 Bom 602, 121 I C 581 A I R 1930 Bom 5

(s) See 29 of the Code of Civil Procedure, 1882 (now O 1, r 6, in the Code of 1908) runs as follows: 'The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally or jointly and severally liable on any one contract, including letters to bills of exchange, *hundies* and promissory notes'. The judgment seems to assume that the effect of s 43 was to make all joint contracts joint and several. See *Motilal Bechardass v Ghellabhai Hariram* (1892) 17 Bom 6 11, and *Mukhammad Isakari v Jathe Ram Singh* (1900) 22 All 307 316

of the Code of Civil Procedure, which relates not to joint, but to several and to joint and several, liability. The same view of the section has been taken by the High Court of Lahore (t)

In this connection may be noted O 1, r 10, of the Code of Civil Procedure, which provides that the Court may order, either of its own motion or on the application of a party to a suit, "that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions in the suit, be added." The effect of s 43 being, according to the above decisions, to render the liability of joint promisors joint and several and to exclude the right of a joint contractor to be sued along with his co contractors, the provisions of O 1, r 6, are applicable to the case, and the promisee is at liberty to sue any one or more of the joint promisors. But this right is distinct from, and does not affect, the right of a defendant to apply to the Court under O 1, r 10, of the Code to have his co contractor added as a party. But such an application, it is conceived, can be sustained not on the ground that the joint contractor "ought to have been joined" as defendant, but only under the latter branch of the section, if the Court considers it necessary to do so (u)

(t) *Muhammad Ismail Khan v Saad ud-din Khan* (1927) 9 Lah 217 104 I C 700 A I R 1927 Lah 819, *Jag Lal v Shri Lal* (1902) Punj Rec no 37, *Thomas Beck v Thomas Siddle* (1892) Punj Rec no 11 *Livingstone v Fero Din* (1914) Punj Rec no 10 p 396 (joint tenants) *Liquidator, Union Bank of India v Gobind Singh* (1923) 4 Lah 239 77 I C 338 A I R 1925 Lah 148 (partners)

(u) Note the observations of Strachey C J in *Muhammad Aslam v Radhe Ram Singh* (1900) 22 All 307 316 317. In their note to s 43 Messrs Cunningham and Shephard at pp 158 159 of their commentary on the Indian Contract Act "th ed say that if this section is intended to deny to joint debtors the right to be sued jointly in one suit, it involves a departure from English law

and that 'in view of this section and the 29th section of the Code of Civil Procedure it is clear that the non joinder of a co debtor is no ground of defence to a suit but it is apprehended that an application made under the 32nd section of the Code to add as a defendant an omitted co debtor would be dealt with in the same manner as it is in England. I cannot agree with this view. As the judgments in *Kendall v Hamilton* (1879) L R 4 A C 504 show such an appreciation would in England be dealt with in the same manner as the old plea in abatement and the effect of the latest decisions is that a joint debtor though he has not an absolute has an ordinary and a *prima facie* right to have his co debtors joined. *Hilson Sons & Co v Balcarres Brook Steamship Co* [1893] 1 Q B 422, *Robinson v Gissel* [1894] 2 Q B 685'

**Co-heirs**—This section speaks of two or more persons making a joint promise, and it has no application where parties become jointly interested by operation of law in a contract made by a single person. Hence the section does not apply to the case of several heirs of the original debtor, and they all must be joined as parties to the suit (t)

**Co-tenants**—The provisions of this section have been applied to joint tenants (w)

**Contribution between joint promisors**—This clause represents the doctrine of English equity as distinct from that of the Common Law Courts. It would be useless to cite English authorities.

Joint tenants are joint promisors, therefore the liability is only to contribute to the performance of the promise. Hence if one of several persons jointly liable for a debt is sued, and is compelled to satisfy the debt and the costs of the suit, he can only call on the others to contribute in respect of the debt, and not in respect of the costs (x)

**When liability to contribute arises**—In a case decided before the enactment of the Contract Act, it was held that the mere existence of

Note also the observations of Crowe J in *Dick v Dhunji Jaitla* (1901) 25 Bom 378-386, where the learned Judge says

With regard to the argument based on the provisions of s. 43 of the Contract Act, it seems to me that that section merely takes away the right of a joint debtor to be sued jointly and to plead in abatement a right which was abolished in England by the Judicature Acts. It is still open to a defendant to apply to the Court for joinder of a person who ought to have been included in the action and to use the words of Earl Cairns L.C. in *Kendall v Hamilton* (1879) 4 App. Cas. 504: the application to have a person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed. Sec. 32 of the Civil Procedure Code gives the Court absolute discretion either on application or *suo motu*, to dismiss or add parties.

The opinion expressed by Mr. Justice

Crowe corresponds to a considerable extent with that of Messrs. Cunningham and Shephard. We agree with Strachey C.J. in thinking that an application under O. 1, r. 10 to add as defendant an omitted debtor should not be dealt with as in England but on the principles expressed in the Contract Act and to be reasonably inferred from its language. As to the practice in amendment see *Muhammadi Ismail Khan v Said ud-din Khan* (1927) 104 I.C. 700, A.I.R. 1927 Lah. 819.

As to cases under the Bengal Tenancy Act see *Chamathari v Trigina Nath* (1913) 17 C.W.N. 833, 19 I.C. 981.

(t) *Shailk Sahai v Keshu a M. Jan* (1916) 24 Cal. L.J. 371, 30 I.C. 561.

(w) *Nirdosh v Jaluria* (1911) 20 Cal. L.J. 492. *Jaghunath Das v J. Seshwar Prasad Chaudhuri* (1927) 7 Lat. 353, 100 I.C. 484. A.I.R. 1927 Pat. 16.

(x) *Jungab v Lalim Singh* (1871) 6 N.W.P. 192.

a decree against one of several joint debtors does not afford ground for a suit for contribution against the other debtors "Until he has discharged that which he says ought to be treated as a common burden, or at any rate done something towards the discharge of it, he cannot say that there is anything of which he has relieved his co debtors, and which he can call upon them to share with him" (y) And the law under the Contract Act would appear to be the same see illustrations to the section (z)

**Contribution as between judgment debtors**—The question as to whether, as between persons against whom a joint decree has been passed, there is any right of contribution at all depends upon the question whether the defendants in the former suit were wrong doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act In that case no suit for contribution will lie (a) Thus where a decree for costs against two defendants jointly was executed against one of them, who had set up a false defence in the suit in collusion with the other, and the former sued the latter for contribution, it was held that the suit would not lie (b) The High Court of Madras has considered it an open question (c) how far the rule in *Merryweather v Nixan* (d), which lays down that there is no contribution between joint tortfeasors, was applicable to India, having regard to the observations of Lord Herschell in *Palmer v Wick, etc, Steam Shipping Co* (e) where the noble lord said that the rule did not appear to him 'to be founded on any principle

(y) *Ram Pershad Singh v Neerbhoy Singh* (1872) 11 B L R 76

(z) See *Abraham v Raphael* (1916) 39 Mad 288 291 27 I C 337

(a) *Siput Singh v Imrit Tewari* (1880) 5 Cal 720, citing *Merryweather v Nixan* (1799) 8 T R 186, 16 R R 810, (the real leading case is however, *Adamson v Jarvis* (1827) 4 Bing 66 29 R R 503 See [1894] A C at p 324), *Hari Saran Maistra v Jotindra Mohan Lahiri* (1900) 5 C W N 393 *Mohesh Chandra v Boydia Nath* (1901) 6 C W N 88, *Krishna Ram v Ralmini Sewak Singh* (1887) 9 All 221

(b) *Iyangara v Pariyangot* (1883) 7

Mad 89 *Sudhu Singh v Lehna Singh* (1901) Punj Rec no 7 *Gobind Chunder v Srigo bind* (1897) 24 Cal 330 See also as to contribution between judgment debtors *Brojendra Kumar Roy v Rash Behari Roy* (1886) 13 Cal 300 and *Lakshmana Ayyan v Rangasami Ayyan* (1894) 17 Mad 78, where it was held upon the facts of the case that one judgment debtor against whom execution had been levied was entitled to contribution against the rest

(c) *Siva Panda v Jujusti Panda* (1902) Mad 599

(d) See note (a), above

(e) [1894] A C 318 324

brought by some of them only, and the other promisees are subsequently added as plaintiffs, whether on objection taken by the defendant (r) or by the Court of its own motion (s), the whole suit will be dismissed if it is at that time barred by limitation as regards the other promisees

With regard to partnership suits the Code of Civil Procedure 1908 O 30, r 4, provides as follows —

“(1) Notwithstanding anything contained in section 45 of the Indian Contract Act 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. Observe that this rule applies only where the firm, named as such, is a party to the suit. It does not enable one of several co contractors to sue in his own name alone. Where a suit was brought in a firm name for an alleged debt to the firm, and the Court doubted whether the firm was proved to exist, but was clear that if it did no contract with it was shown so that the name of the firm was in effect struck out of the suit, one of the alleged partners (who was already a party) claimed to carry on the suit, taking advantage of the above rule in his own name without joining his co contractor, and this was rightly disallowed (t)

“(2) Nothing in sub rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have (a) to apply to be made a party to the suit or (b) to enforce any claim against the survivor or survivors.”

Reference to this Rule is omitted, I know not why, in a Bombay case of 1927 which arrived at the same result (u)

L R 117 109 I C 99 A I R 19 S Bom 191 But if a contract is entered into with one partner only it is competent for him to maintain a suit by himself without making his partners co plaintiffs. *Uehr Singh v Chela Ram* (1906) Punj Rec no 127 See *Ahmed Bibi v Abdul Kader* (1902) 20 Mad 26 *Imam ud-din v Laladhar* (1892) All W N 104

(r) *Pamsebul v Pamlall Koondoo* (1881) 6 Cal 815 *Kalidas v Nathu*

*Bhagvan* (1883) 7 Bom 217 *Fatmahas v Pirbhas* (1897) 21 Bom 580

(s) *Imam ud-din v Laladhar* (1897) 14 All 574 *Pam Kinkar v Akhil Chandra* (1908) 35 Cal 519

(t) *Hari Singh v Karam Chawl Kanchi Pam* (1906) 8 Lah 1 100 I C 721 A I R 1927 Lah 115

(u) *Derashi v Bh Kamehan* 29 Bom I R 147 100 I C 913 A I R 1927 Bom 120

**Validity of discharge by one of several joint promisees**—See notes under the same head to s 38 (p 277 above)

**Suit by a surviving partner**—The general rule of English law is (contrary to the present section) that joint contracts are enforceable by the survivors or survivor alone. There is an equitable exception, founded on mercantile custom as to debts due to partners, but even in this case, “though the right of the deceased partner devolves on his executor, the remedy survives to his companion, who alone must enforce the right by action and will be liable on recovery to account to the executor or administrator for the share of the deceased” (v). The present section extends the mercantile rule of substantive right to all cases of joint contracts. But it does not follow that it was intended to alter the rules of procedure in cases where the mercantile rule of substance was already admitted. It seems therefore to be the better opinion that the representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrues due to the partnership in the lifetime of the deceased (w). It has been so laid down by the High Courts of Allahabad, Bombay, Madras and Lahore, but the contrary has been maintained by the Calcutta High Court (x). English law and the alteration of it by the Act were discussed and the difficulty occasioned by the words “as between him and them” in connection with this point was considered by Farran J in *Motilal v Ghellabhai* (y). The learned Judge there stated “It is difficult to give these words their full effect if the surviving contractors in the case of partners are allowed to sue alone. The right to performance of the contract as far as the other contracting party is concerned rests just as much with the representative of the deceased partner as with the surviving partner. Can the latter then sue without joining the former as a party to the suit? Logical consistency points to an answer in the negative. The case of partners is, however, as we have shown anomalous and we think that, as the

(v) *Williams on Executors* 12th ed 518

(w) *Gobind Prasad v Chandar Sekhar* (1887) 9 All 486. *Motilal v Ghellabhai* (1892) 17 Bom 6. *Va dyanatha Ayyar v Chinnasami Aask* (1893) 17 Mad 18. *Debi Das v Aripat* (1898) 20 All 365. *Ugar Sen v Lakshmi Chand* (1910) 32 All 638. *M H Raj v George Knight* (1906)

Punj Rec no 10. *Mool Chand v Mul Chand* (1903) 4 Lah 142. 71 I C 901. A I R 1903 Lah 197.

(x) *Pam Narain v Ram Chunder* (1890) 18 Cal 86. But see *Bal Kissen Das Daga v Kanhya Lal* (1913) 17 Cal L J 648 at pp 651 652. 21 I C 509.

(y) (1892) 17 Bom 6 14

Legislature has not enacted that the representatives of a deceased partner must join in suing in a partnership contract jointly with the surviving partners, we are not wrong in holding that, notwithstanding the provisions of the Contract Act, the old practice of the Small Causes Court need not be changed "

The case is not literally covered by s 263, but it may be held that a contrary intention within the meaning of the present section sufficiently appears from the nature of the transaction when it is once ascertained to be a partnership transaction, regard being had to the uniform and well understood course of practice

With regard to the supposed anomaly, it disappears when we remember that in mercantile usage the firm is regarded as a person distinct from the individual partners so long as the partnership exists and is not fully wound up, and this view is now to a certain extent recognised in English procedure by allowing actions to be brought by and against partners in the name of the firm (z) Very much the same procedure has been introduced by the Code of Civil Procedure, 1908 (a)

In so far as the firm is treated like a person, the executors of a deceased partner are no more appropriate parties to the recovery of a partnership debt than the executors of a deceased shareholder to the recovery of a debt due to an incorporated company

**Deceased partner's estate**—The High Court of Bombay has decided, after full examination of the Rule and the present section of the Act in the light of both Indian and English authorities, that where a partner has died before the commencement of a suit against the firm, the Rule does not enable the plaintiff to make the deceased partner's separate estate liable without adding his legal representatives as parties (b)

**Suit by representative of deceased partner**—The representative of the estate of a deceased partner may maintain a suit for the recovery of a partnership debt, and may join the surviving partners as defendants in the suit where they refuse to join as plaintiffs (c)

**Right of performance of representative jointly with survivor**—Where, by the terms of a mortgage interest was payable by the mort

( ) Order XLVILA Pollock, Digest (1927) 51 Bom 950, 105 1 C 303  
of Law of Partnership 12th ed p 148 A I R 1927 Bom 531  
(a) See Order XLV (c) *Aga Gulam Hussain v I P*  
(b) *Mathuradas v Ebrahim Faalbhoy Sassoon* (1897) 21 Bom 412 491

gagor to two mortgagees jointly, it was held that upon the death of one of the mortgagees his legal representative was entitled to a moiety of the interest due under the mortgage (d)

**Survivorship in case of Government Securities**—The Indian Securities Act X of 1920, s 4, runs as follows —

4 (1) Notwithstanding anything in section 45 of the Indian Contract Act 1872—

(a) when a Government security is payable to two or more persons jointly and either or any of them dies, the security shall be payable to the survivor or survivors of those persons and

(b) when a Government security is payable to two or more persons severally and either or any of them dies the security shall be payable to the survivor or survivors of those persons or to the representative of the deceased or to any of them

(2) This section shall apply whether such death occurred or occurs before or after this Act comes into force

(3) Nothing herein contained shall affect any claim which any representatives of a deceased person may have against the survivor or survivors under or in respect of any security to which sub section (1) applies

### *Time and Place for Performance*

46.—Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time

Time for performance of promise where no application is to be made and no time is specified

*Explanation*—The question “what is a reasonable time” is, in each particular case, a question of fact

“Engagement”—The word “engagement” in this section is a survival from the language of the original draft, in which for some reason not easy to understand it is constantly used instead of “agreement” or “promise” Here it is synonymous with “promise”

**Reasonable time**—It is also difficult to understand why decisions should be reported on the question of what is reasonable time which is declared by the Act itself to be always a question of fact, but, having been reported, they must be mentioned Where the defendants agreed to supply coal to the plaintiffs from time to time, as required by the defendants, on reasonable notice given to them, a notice given by the plaintiffs on the 22nd July, 1898, for the supply of 2 648 tons of coal on or before 31st August, 1898 was held not to be reasonable (e) Jenkins C J said ‘Perhaps it might have been physically

(d) *Kan Lu Pung v Isammam* (1901) 25 Mad 383

(e) *The Central Coal Co., Ltd v Horner Wal & Co* (1899) 24 Bom. 97 104

possible for the defendants to carry out such an order, but it would clearly have required an effort which the plaintiffs had no right to demand. I do not think that a notice involving such an effort from business men with innumerable other matters to attend to can be held to be such a reasonable notice as was intended by both parties when this document was given." Where the defendant agreed to discharge a debt due by the plaintiff to a third party and in default to pay to the plaintiff such damages as he might sustain, and no time was fixed for the performance of the obligation, it was held that the failure of the defendant to perform it for a period of three years amounted to a breach of the contract, as that was a sufficient and reasonable time for performance (f)

Compare the Negotiable Instruments Act XXVI of 1881, s 105, which runs as follows —

"In determining what is a reasonable time for presentment for acceptance or payment, for giving notice of dishonour, and for noting, regard shall be had to the nature of the instrument and the usual course of dealing with respect to similar instruments, and in calculating such time public holidays shall be excluded"

**47.—**When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

#### Illustration

A promises to deliver goods at B's warehouse on the 1st January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

**Common Law rule.**—This section, with the illustration, simplifies the rule. According to the Common Law as laid down in the only modern case on the subject (g) the illustration would have run thus

(f) *Dorasinga v Arunachalam* (1899) 23 Mad 441, *Subramanian v Muthia Men & Co* 593 64 R R 810 (1912) 35 Mad 639, 17 I C 721  
(g) *Startup v Macdonald* (1843) 1

"B is not bound to be at the warehouse to receive the goods after the usual hours of business, and if he is not there A has not performed his promise. If B is there and could receive the goods before midnight, but refuses to do so, A has performed his promise." There are some further minute distinctions in English law which it would be useless to cite here (h). The amendment made by this section is obviously in accordance with good sense, though the English rule is capable of a logical explanation.

**Delivery on Sunday.**—In a suit for damages against the defendant, a German, for non delivery of goods, it was contended that he was not bound to deliver the goods on Sunday, which was the last day named in the contract for performance. It was held that the "Lord's Day Act" did not apply to India, at any rate not to the defendant, who was a German, and that, in the absence of a custom to the contrary, he was bound to deliver the goods on that day if they had not already been delivered (i).

48.—When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

*Explanation* —The question "what is a proper time and place" is, in each particular case, a question of fact.

The proper place will of course be the place named in the contract if any. Where more than one place is named, "it is for the person to whom payment is to be made to fix the place at which he will be paid, until he has selected the place at which he will be paid there can be no default." The English decision from which we quote would presumably be followed here (j).

(h) They are stated in Leake, 7th ed., 639—642.

(i) *Lalchand Balliswan v John L Acersten* (1890) 15 Bom 338. See also

*Kasiram v Harnandroy* (1920) 32 Cal L J 140, 58 I C 396.

(j) *Thorn v City Fire Mills* (1883) 40 Ch D 307, 360.

49.—When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place (k).

Place for performance of promise where no application to be made and no place fixed for performance.

*Illustration.*

A. undertakes to deliver a thousand maunds of jute to B. on a fixed day. A. must apply to B. to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

**Rule of Common Law.**—In the Common Law the rule as to money payments (which, however, is rendered practically obsolete by the methods of modern business) is that, if no place is named, the debtor is bound to find the creditor, provided he is within the jurisdiction (l) but if the obligation is to deliver heavy or bulky goods he must procure the creditor to appoint a place to receive them. "And so not a diversitie between money and things ponderous, or of great weight" (m). The present section lays down a reasonable rule for all cases without distinction. The late Tyabji J. seems at first sight to have overlooked the present section when he said that "where no specific contract exists as to the place where the payment of the debt is to be made, it is clear that it is the duty of the debtor to make the payment where the creditor is" (n). But perhaps his words were intended only to cover the case of the promisor failing to apply for the appointment of a reasonable place (p). The words "no place is fixed" do not exclude any inference the Court may draw as to the intention of the parties from the nature and circumstances of the contract, especially where the obligation is to pay money (q).

(k) *Qu.* whether failure to perform this preliminary duty amounts to a breach of the whole contract. See *Armitage v. Insole* (1850) 80 R. R. 388; 14 Q. B. 728.

(l) See *Haldane v. Johnson* (1853) 8 Ex. 689; 91 R. R. 705; *Kedarnath Bhuramal v. Surajmal Gorindra* (1907) 9 Bom. L. R. 903, at p. 911; *i* *Manjaya v. Virabhadrapa* (1908) Bom. L. R. 993.

(m) *Co. Lit.* 210 b. The case of a man travelling about England with a considerable sum of money, who

serious in Littleton's time and appreciable in Coke's, does not seem to have been thought of as an objection. But archaic law rarely favours debtors.

(n) *Motilal v. Surajmal* (1906) 30 Bom. 167, at p. 171; see also *Dhanupada v. Fforde* (1887) 11 R. R. 619, 636.

(p) *Soniram Jee v. R. D. Tata & Co.* (1927) L. R. 265, 269; 29 Bom. L. R. 1027; 1927 P. C. 156.

(q) *Ib.*

**Place of delivery.**—Where by an agreement for the sale of goods it was stipulated that the goods were “to be delivered at any place in Bengal in March and April, 1891,” and it was added, “the place of delivery to be mentioned hereafter,” the Judicial Committee held that the buyer had the right to fix the place, subject only to the express contract that it must be in Bengal and to the implied one that it must be reasonable. The use of the words “place of delivery to be mentioned hereafter” did not take away that right, nor did they leave the question of the place of delivery to be settled by a subsequent agreement. If the latter had been meant, the expression used would have been “agreed on” instead of “mentioned.” It was also held that such a contract does not fall within s 91 of the Act (now s 36 (1) of the Indian Sale of Goods Act 1930), but rather resembles what is contemplated in the present section (r)

“Without application by the promisee.”—This section does not apply to cases where money is made payable *on demand* by the promisee (s)

**Place of performance in pakki adat contracts**—In the case of *pakki adat* agency the place of payment is the place where the constituent resides, unless he has chosen to fix another place by express direction (t)

Performance in manner or at time prescribed or sanctioned by promisee

**50.**—The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions

*Illustrations*

(a) B owes A 2 000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit and this is done by C. Afterwards and before A knows of the transfer C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c) A owes B 2 000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.

(r) *Grenon v Lachmi Narain Augur wala* (1896) 24 Cal 8, L R 23 I A 119

(s) *Raman Chettyar v Gopalachari* (1908) 31 Mad 223 at p 228

(t) *Kedarmal v Surajmal* (1908) 33

Bom 361. As to the incidents of *pakki adat* in general, see *Kanji v Bhagwandas* (1905) 7 Bom L R 57, at p 65 and s c on app *sub nom Bhagwandas v Kanji* (1906) 30 Bom 205

49.—When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place (k)

Place for performance of promise where no application to be made and no place fixed for performance

*Illustration*

A undertakes to deliver a thousand maunds of jute to B on a fixed day A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place

**Rule of Common Law.**—In the Common Law the rule as to money payments (which, however, is rendered practically obsolete by the methods of modern business) is that, if no place is named, the debtor is bound to find the creditor, provided he is within the jurisdiction (l) but if the obligation is to deliver heavy or bulky goods he must procure the creditor to appoint a place to receive them “And so not a diversitie between money and things ponderous, or of great weight” (m) The present section lays down a reasonable rule for all cases without distinction The late Tyabji J seems at first sight to have overlooked the present section when he said that “where no specific contract exists as to the place where the payment of the debt is to be made, it is clear that it is the duty of the debtor to make the payment where the creditor is” (n) But perhaps his words were intended only to cover the case of the promisor failing to apply for the appointment of a reasonable place (p) The words “no place is fixed” do not exclude any inference the Court may draw as to the intention of the parties from the nature and circumstances of the contract, especially where the obligation is to pay money (q)

(k) *Qu* whether failure to perform this preliminary duty amounts to a breach of the whole contract See *Armistage v Insole* (1850) 80 R R 388, 14 Q B 728

(l) See *Haldane v Johnson* (1853) 8 Fc 689, 91 R R 705, *Kedarnath Bhurwal v Surajmal Gurindran* (1907) 9 Bom L R 903, at p 911, *Pullappa Manjaya v Tirabfadrappe* (1905) 7 Bom L R 993

(m) *Co Lit* 210 b The danger of travelling about England with any considerable sum of money, which was

serious in Littleton's time and appreciable in Coke's, does not seem to have been thought of as an objection But archaic law rarely favours debtors

(n) *Motilal v Surajmal* (1906) 30 Bom 167, at p 171, see also *Dhanjibhai v Fforde* (1887) 11 Bom 643, 656

(p) *Soniram Jeetmull v P D Tata & Co* (1927) L R 51 I A 263, 269, 27 Bom I R 1027, 1021 C 610, 11 I 1027 P C 156

(q) *Id*

**Simultaneous performance.**—This section expresses the settled rule of the Common Law To understand the principle rightly, we must remember that in a contract by mutual promises the promises on either side are the consideration, and the only consideration, for one another But the terms of a promise may express or imply conditions of many kinds, and the other party's performance of the reciprocal promise, or at least readiness and willingness to perform it, may be a condition It is obviously immaterial whether it is called a condition or not, if in substance it has that effect To say "I will pay when you deliver the goods" is more courteous than to say "If you do not deliver the goods in a reasonable time you will not be paid", but "when" implies "if," and the result is the same And if it appears on the whole from the terms or the nature of the contract that performance on both sides was to be simultaneous, the law will attach such a condition to each promise, with the operation laid down in the present section

Performance of one party's promise may have to be completed or tendered before he can sue on the other's reciprocal promise In that case it is said to be a *condition precedent* to the right of action on the reciprocal promise

Where the performances are intended to be simultaneous as supposed in this section (goods to be delivered in exchange for cash or bills, and the like), they are said to be concurrent conditions and the promises to be *dependent* Observe that "concurrent conditions are only a modified form of conditions precedent" (x)

Promises which can be enforced without showing performance of the plaintiff's own promise, or readiness or willingness to perform it, are said to be *independent*

It is doubtful whether these terms are of much or any real use "The real question, apart from all technical expressions, is what in each instance is the substance of the contract" (y) But the terms cannot be said to be wholly obsolete, and acquaintance with them is necessary for the understanding of the English decisions

In order to apply the rule of this section we must know whether the promises are or are not "to be simultaneously performed" This is a question of construction, depending on the intention of the parties collected from the agreement as a whole Before Lord Mansfield's

(x) Langdell, Summary, s 32

Williams (1872) L R 7 Ex at p 261

(y) 1 cr Martin B Bradford v

1.

(d) A desires B, who owes him Rs 100 to send him a note for Rs 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

**Manner and time of performance.**—This rule is elementary. It may be doubted whether illustration (c) does not rather belong to s 63, but no practical difficulty can arise. The facts of illustration (d) must not be confused with those which have given rise to troublesome questions in cases of contracts by correspondence (ss 4 and 5, p 36 *sqq* above). Here a complete contract is assumed to exist. It is hardly needful to add that where the request is to send not legal currency, but a cheque or other negotiable instrument, this does not imply any variation of the rule that payment by a negotiable instrument is conditional on its being honoured on presentation within due time (u).

Payment to an agent, who to the debtor's knowledge had no authority to receive the payment, does not discharge the debtor (t).

### *Performance of Reciprocal Promises*

**51.**—When a contract consists of reciprocal promises to

Promisor not bound to perform unless reciprocal promisee ready and willing to perform

be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise

#### *Illustrations*

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods unless A is ready and willing to deliver them on payment (w).

(b) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment unless A is ready and willing to deliver the goods on payment of the first instalment.

(u) See *Refarmal v Surajmal* (1907) 9 Bom L R 903, at p 911.

(c) *Mackenzie v Shib Chunder Seal* (1874) 12 B L R 360.

(w) *Chengraseth Chetty & Sons v*

*Akkraju Venkanna & Sons* (1916) 40 I C 299, 49 Mal I J 300 where the section is cited but this illustration seems to be overlooked.

s 38 of Act III of 1930, has purposely left the point open as "in each case depending on the terms of the contract and the circumstances of the case"

It seems difficult at this day (except as to the unsettled question last mentioned, which is confined to the sale of goods by instalments) to add anything in principle to the modern rule, and Indian decisions are, as might be expected merely illustrative

A contract for the sale of shares in a company to be transferred into the name of the purchaser upon payment of the price by him on or before a certain day falls within this section, so that transfer of the shares and payment of the purchase money should be concurrent acts (f)

**Waiver of performance**—The section does not of course, give any special remedy to a party who has chosen to perform his part without insisting on the reciprocal performance which was intended to be simultaneous with his own, as where a seller of goods "for cash on delivery" chooses to deliver the goods without receiving the price (g)

**Readiness and willingness**—In the case of a contract for the sale of shares in a company it is not necessary, in order to prove that a vendor was ready and willing to perform his part of the agreement, that he should be the beneficial owner of the shares, or that he should tender to the purchaser the final documents of title to the shares. It is enough that he should be able and willing to constitute the purchaser the legal owner of the shares agreed to be sold. Thus where the vendor tendered to the purchaser share allotment and receipt papers, and together with each a transfer paper and an application paper, both signed in blank by the original allottee it was held that the vendor was ready and willing to perform his promise (h). But where neither the transfer nor the form of application for transfer was offered to the purchaser, nor had the vendor any such documents signed by the

(f) *Imperial Banking and Trading Co v Atmaram Madhary* (1865) 2 B H C 246, *Imperial Banking and Trading Co v Pranjivandas Harjivandas* 2 B H C 208

(g) *Sooltan Chund v Schuller* (1878) 1 Cal 250. The case turned really on s 39 (see p 281 *sqq* above) and it was not seriously arguable that s 51 had any

thing to do with it

(h) *Imperial Banking and Trading Co v Atmaram Madhary* (1865) 2 B H C 246. See also *Parbhudas Pranjivandas v Pamlal Bhagirath* (1866) 3 B H C 69 where share receipts with applications for transfer were tendered to the purchaser

time the Courts were inclined to hold every promise or covenant complete in itself and independent (z) But in 1773 Lord Mansfield said that "the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties" (a), and similarly Lord Kenyon in 1797. "Whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done" (b), and such is the modern law

There is a distinct question from that of "condition precedent," namely whether failure to perform some parts of a contract deprives the party in fault of any right to remuneration for that which he has performed, and entitles the other to put an end to the contract, or is only a partial breach which leaves the contract as a whole still capable of performance In dealing with cases of this kind it may be very difficult to ascertain the true intention of the parties We have to "see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for, or whether it merely partially affects it and may be compensated in damages" (c) Illustration (b) suggests, though it does not actually raise or decide, a point which has given much trouble, and is not settled either by any of the general provisions of the Act, or by any disposition of the chapter on the Sale of Goods If A fails to deliver the first instalment of the goods, or delivers a short quantity, may B put an end to the contract? The better opinion, supported by decisions of the Court of Appeal in England and of the Supreme Court of the United States (d), is that, in the absence of any specific indication of a contrary intention, he may But there are also decisions difficult to reconcile with this view (e) The Sale of Goods Act, 1893, s 31, followed by

(z) For the history of the change see 92, *Lorrington v Wright* (1885) 115 U S 189

(a) *Kingston v Preston*, cited in *Jones v Barkley*, Doug 659, Finch Sel Ca 735, 736

(b) *Morton v Lamb* (1797) 7 T R 125, 4 R R 395, Finch Sel Ca at p 741

(c) 1st Cur, *Bettini v Gye* (1876) 1 Q B D 183

(d) *Honck v Miller* (1841) 7 Q B D

(e) *Simjson v Crippin* (1872) L J 8 Q B 14, *Freeth v Parr* (1874) 11 Q C P 209, which decides only that failure in payment for one instalment is not a repudiation of the whole contract and to that extent is confirmed by *The Mercet Steel and Iron Co's Case* (1891) 9 App Ca 431, see p 292 above

Where goods are sold for "cash on delivery," and the vendor delivers a portion of the goods, and the purchaser offers to pay the price thereof if certain cross-claims set up by him are adjusted, it cannot be said that he is not ready and willing to perform his promise, so as to entitle the vendor to refuse delivery of the remaining goods (*p*).

Inordinate delay on both sides is evidence of the contract being abandoned, and, if that inference is drawn, the contract is enforceable by neither party (*q*)

**Averment of performance.**—According to the Common Law rules of pleading, where a contract consists of reciprocal promises to be simultaneously performed, neither party to the contract can maintain an action without averring a performance, or an offer to perform, on his own part (*r*), but the necessity for such specific averment has been abolished in England for more than half a century, and now no averment at all of the performance of conditions precedent is required in the first instance in either England (*s*) or India. The English rule of practice has been reproduced here in the Code of Civil Procedure, 1908 (*t*)

**52.**—Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires

Order of performance of reciprocal promises

#### Illustrations

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock in trade to B at a fixed price, and B promises to give security for the payment of the

*Jeena d. Sons* (1924) 47 Mad. L. J. 270  
55 I. C. 270

(p) *Sordani Chaud v. S. J. Mer* (1875) 4 Cal. 255.

(q) *Pearl Mill Co. v. Jey Taxuary Co*  
[1919] 1 K. B. 75

(r) 2 Smith L. C. 9, 15 (15th ed.).

(t) B. S. C. Order XIX, r. 14, 2  
Sm. L. C. 16. Under the old rule it was

enough to aver substantial readiness and willingness. *Packer v. Johnson* (15 1)  
1 East, 206, 6 R. P. 252.

(u) See Order VI, r. 6

original allottee in his possession, it was held that the vendor could not be said to be ready and willing to perform his promise, as the allottee had it in his power to decline to complete the contract until he had executed the transfer and the application papers (i) Further, it is not necessary to prove readiness and willingness that the vendor should have made an actual tender to the purchaser of the transfer deed (j) Nor is it necessary that the vendor should have the shares in his possession continuously from the date of the contract down to the time of performance If a party bound to do an act upon request is ready to do it when it is required he will fully perform his part of the contract, although he might happen not to have been ready had he been called upon at some anterior period (k) But where the purchaser before the day fixed for delivery gives notice to the vendor that he will not accept the shares, the vendor is exonerated from giving proof of his readiness and willingness to deliver the shares (l) Similarly as to goods, it is a still more elementary proposition that a vendor may be ready and willing to deliver without having the goods in his actual custody or possession, it is enough if he has such control of them that he can cause them to be delivered (m) And where the vendor of goods repudiates the contract on being called upon for delivery it is enough for the purchaser to prove that he was ready and willing to carry out his part of the bargain, and had made preparations with the object of having the money ready in hand to pay for the goods on delivery This section does not require him to show that he made an actual tender of the money (n) But a mere demand for delivery of goods without payment or tender is not evidence of the buyer being ready and willing to pay on delivery (o)

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- (i) *Jivraj Megji v Poulton* (1865) 2 B H C 203
- (j) *Imperial Banking and Trading Co v Pranjivandas Harjivandas* (1865) 2 B H C 258
- (k) *Jivraj Megji v Poulton* (1865) 2 B H C 253, 256, *Maganbhai Hemchand v Manchabhai Kallianchand* (1866) 3 B H C 79, 86
- (l) *Darabhai Dipchand v Manilal Irigbhukan* (1871) 8 B H C A C 123
- (m) *Kanwar Bhan Sukhi Vani v Ganpat Lal I m Jagan* (1926) 91 I C 304 A I R 1926 Lah 318
- (n) *Shriram v Madangopal* (1903) 3 Cal 865 See Indian authorities summed up *Ganesh Dal Ishar Das v Jam Nath* (1927) 9 Lah 148, 163—165, 111 I C 498, cp *Kidar Nath Behari Lal v Shamlu Nath Nandu Mal* (1926) 8 Lah 198, 99 I C 812, A I R 1927 Lah 178
- (o) And the want is not supplied by the fact if so it was, that the seller was not ready and willing to deliver (*Ara gravelu Chetty & Sons v Alwarpu I m*

Where goods are sold for "cash on delivery," and the vendor delivers a portion of the goods and the purchaser offers to pay the price thereof if certain cross-claims set up by him are adjusted, it cannot be said that he is not ready and willing to perform his promise, so as to entitle the vendor to refuse delivery of the remaining goods (p)

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*Kanna & Sons* (1924) 49 Mad L J 300  
86 I C 299

(p) *Sooltan Chund v Schiller* (1878) 4 Cal 255

(q) *Pearl Mill Co v Iry Tannery Co*  
[1919] 1 K B 78

(r) 2 Smith L C 9 15 (13th c 1)

(s) R S C Order XIX r 14 2  
Sm L C 16 Under the old rule it was enough to aver substantial readiness and willingness. *Raeson v Johnson* (1801)  
1 East 203, 6 R P 252

(t) See Order VI r 6

money A's promise need not be performed until the security is given for the nature of the transaction requires that A should have security before he delivers up his stock

This section is founded on the same English authorities as s 51, and on similar reasons, and does not appear to require any further commentary (u)

**53** — When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented, and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non performance of the contract

*Illustration*

A and B contract that B shall execute certain work for A for a thousand rupees B is ready and willing to execute the work accordingly, but A prevents him from doing so The contract is voidable at the option of B and if he elects to rescind it he is entitled to recover from A compensation for any loss which he has incurred by its non performance

**Impossibility created by act of party** — This is in substance the rule not only of the Common Law, but of all civilised law (t) No man can complain of another's failure to do something which he has himself made impossible The principle is not confined to acts of direct or forcible prevention, which are neither frequent nor probable, but extends to default or neglect in doing or providing anything which a party ought under the contract to do or provide, and without which the other party cannot perform his part A man agrees to sell standing wood, the seller is to cut and cord it, and the buyer to take it away and pay for it The seller cords only a very small part of the wood, and neglects to cord the rest, the buyer may determine the contract and recover back any money he has paid on account

"This was an entire contract, and as by the defendant's default

(u) Elementary illustration (certain payments to precede grant of a lease) *Anant Bharthi v Sarup Singh* (1928) 28 All L J 492 115 I C 793 A I R

1928 All 360

(t) See the rule applied in *MacLay v Dick* (1891) 6 App Ca 201 by the House of Lords on an appeal from Scotland

the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract and recover back the money that they had paid under it, they were not bound to take a part of the wood only" (w)

If the prevention by default goes only to one particular term or condition of the contract, the party so prevented from fulfilling that term or condition is entitled to treat it as fulfilled, and insist on payment or other reciprocal performance accordingly, or if there was an agreed penalty in the contract for non fulfilment, or an option to rescind the contract the other party cannot take advantage of it. Especially is this the case with stipulations as to the time of completion. "If the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default" (x)

A railway contractor ordered a steam excavating machine to be capable of digging a certain quantity of material in a working day, and it was agreed that he was to be bound to accept it only if it performed thus on a fair trial at the place where it was to be used. After a partial trial the contractor said the machine had failed, and refused to accept or pay for it. The maker contended that the contractor had himself failed to provide the conditions for a fair trial. This view of the facts was adopted by the Court, and both the Court below and the House of Lords held, as a consequence in law, that the buyer, having by his own fault prevented the application of the test agreed upon, must accept and pay for the machine as if the test had been satisfied. As to the original duty of the buyer to secure the conditions for a fair trial Lord Blackburn laid down this general rule —

Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing though there may be no express words to that effect. What is the part of each must depend on circumstances" (y)

(w) *Clees v. Edwards* (1792) 1 T. R. 541, 181 4 R. R. 414. *v. Cuddy* (1838) 3 M. & W. 357, 49 P. 161, see per Parke B. at p. 649.

(x) *Polerts v. Dury Commissioners* (1869) L. R. 5 C. P. 310 329. *Holme v. Mackay v. Dick* (1881) 6 App. Cas. 251 263.

54.—When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises

#### *Illustrations*

(a) A hires B's ship to take in and convey from Calcutta to the Mauritius a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builders' work for a fixed price. B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within a week. A's promise to deliver need not be performed and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

[P owes N a sum of money, payable in annual instalments, under a compromise decree. P mortgages land to S on the terms that S shall have possession for a certain term of years and employ the mortgage money, which, in fact, is not paid to P, in discharge of the annual instalments. S fails to pay the instalments. P becomes entitled to redeem his land forth with. *Sanwaley Prasad v Sheo Sarup* (1926) 2 Luck 279, 98 I C 770, A I R 1927 Oudh 12.]

**Default of promisor in first performance.**—This section completes the declaration of the principles explained under s 51. In practice the difficulty is to know whether the promises in the case in hand are or are not "such that one of them cannot be performed," etc. One way in which the test is expressed in English authorities is that, if a plaintiff has himself broken some duty under the contract, and his default is such that it goes to the whole of the consideration for the promise sued upon, it is a bar to his suit, but if it amounts only to a partial failure of

that consideration, it is a matter for compensation by a cross-claim for damages (2)

Where a contract between a shipowner and a charterer was contained in the following words, "*Hooper* s to arrive after completion of two country voyages for London on notice in May or June," and the shipowner gave notice after the vessel had completed one voyage only, and the charterer refused to ship the goods, it was held, in a suit by the shipowner for damages for breach of the contract, that the defendant was under the circumstances justified in refusing to perform his promise (a) Garth C J put the decision on the ground that the clause "after completion of two country voyages" was used to indicate to the charterer the time when the ship would be ready, and that it was as essential a part of the contract as any other more direct stipulation as to time (b) Markby J based his judgment on the fact that this clause constituted a material part of the description of the vessel, and that the ship offered not having completed two country voyages, but only one such voyage did not answer the description in the contract (c) From either point of view the above clause formed a condition precedent to the performance of the contract by the shipowner, and the case would thus seem to fall under this section, though there is no reference to it in the judgments Where the condition relates to a supposed existing state of facts, as in *Behn v. Burness* (d) it is not so easy to find the most appropriate section of the Act, but the words of s 18, sub s (3) appear sufficient to cover such a case In *Simson v. Irayya* (e) the defendant agreed to sell to the plaintiffs 5 000 bags of gingelly seed to be delivered within a specified time Two thirds of the price was paid in advance and it was stipulated that the defendant should give notice to the plaintiffs as instalments of 1 000 bags were ready for delivery—and that the plaintiffs should pay the balance of

( ) See the observations of the Judicial Committee in *Oxford v. Irovand* (1868) L R 2 P C 133, 156 In *Laird v. Chettiar v. Kannappa Mudaliar* (1925) 86 I C 476 A 1 R 1925 Mad 1023 the only question was whether a certain voucher held to be nothing more varied the obvious effect of the contract

(a) *Fleming v. Hoegler* (1878) 4 Cal 237

(b) 4 Cal p 247

(c) *Ib* p 251 From this point of view the case was like *Behn v. Burness* (1863) 3 B & S 751 121 R R 791, where the description of a ship in a charter party as "now in the port of Amsterdam" was held to be a substantive part of the contract amounting to a condition

(d) See last note

(e) (1886) 9 Mad 359

proportionate price on each instalment when ready for delivery. No delivery was made within the stipulated time and after the expiration of that period the defendant delivered 3 000 bags to the plaintiffs. The plaintiffs did not pay the proportionate price on those bags when ready for delivery though required by the defendant and the defendant thereupon rescinded the contract and declined to deliver the remaining bags. In a suit for damages by the plaintiffs for non delivery the Court held following *Freeth v Burr* (f) and distinguishing *Withers v Reynolds* (g) that the contract was an entire one and that the payment by the plaintiffs not being a condition precedent to the preparation of the remainder for delivery the defendant was not justified in rescinding the contract. See the commentary on s 51 p 313 above.

**55.**—When a party to a contract promises to do a certain thing at or before a specified time or certain things at or before specified times and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of the essence of the contract the contract does not become voidable by the failure to do such thing at or before the specified time, but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non performance of the promise at the time agreed, unless, at the time

(f) I R 9 C P 219

(g) (1831) 2 B & A 1 692 30 R R 79

of such acceptance, he gives notice to the promisor of his intention to do so (h)

**Time—when of essence of contract.**—In England accidental delays in the completion of contracts for the sale of land within the time named are frequent by reason of unexpected difficulties in verifying the seller's title under the very peculiar system of English real property law. Sharp practice would be unduly favoured by strict enforcement of clauses limiting the time of completion, and accordingly Courts of Equity have introduced a presumption, chiefly, if not wholly, applied in cases between vendors and purchasers of land, that time is not of the essence of the contract. But this presumption will give way to proof of a contrary intention by express words or by the nature of the transaction.

The Judicial Committee has observed that this section does not lay down any principle, as regards contracts to sell land in India, different from those which obtain under the law of England. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. Specific performance of a contract of that nature will be granted although there has been a failure to keep the dates assigned by it, if justice can be done between the parties and if nothing in (a) the express stipulations of the parties, (b) the nature of the property, or (c) the surrounding circumstances make it inequitable to grant the relief. An intention to make time of the essence of the contract must be expressed in unmistakable language (i), it may be inferred from what passed

(h) This clearly means that the promisee cannot claim damages for non performance at the original agreed time not that he cannot claim damages for non performance at the extended time. *Muhammad Habib Ullah v Bird & Co* (1921) L R 48 I A 175, 179, 63 I C 589, A I R 1922 P C 178. Agreement to postponement of performance for an unspecified time operates as extension

for a reasonable time. 16 p 180. The dispute in the courts below had been mainly on the facts. S C 43 All 257.

(i) *Suryanarayana Murthy v S* (1920) 48 Mad L J 150, 80 I C 521, A I R 1915 Mad 211, is useless as reported the terms not being stated. *Kishen Prasad v Kunj Behari Lal* (1920) 24 All L J 210, 61 I C 700, A I R 1926 All 278 (terms of compromise decree) is more to the pur

between the parties before, but not after, the contract is made. The period fixed for completion in that case was two months. The purchaser failed to complete within that period, and subsequently he brought a suit for specific performance against the vendor. Their Lordships held, applying the above principles, that there was no intention that time should be of the essence of the contract, and the purchaser was entitled to specific performance (j). An option to repurchase (being an exceptional provision for the seller's benefit) must be exercised strictly within the time limited (k).

There is no place, however, in mercantile contracts for the presumption that time is not of the essence of the contract (l), indeed the Supreme Court of the United States has laid it down broadly that "in the contracts of merchants time is of the essence" (m). This is especially so as to shipping contracts. As to the sale of goods "unless a different intention appears by the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract" (n). Generally it is to be observed that in modern business documents men of business are taken to mean exactly what they say. "Merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance" (o). Parties to mercantile contracts therefore, cannot rely upon the present action to save them from the consequences of unpunctuality. Thus where the defendant agreed to deliver his elephant to the plaintiff for ludda operation (to capture wild elephants) on 1st October, 1910 and the defendant subsequently obtained an extension of the time till the 6th October, but did not deliver the elephant till the 11th October, it was

pose *Burn & Co., Ltd v Thakur Sahib of Moris State* (1923) 25 C W N 146, 90 I C 52, A I R 1925 P C 188 is a decision on a very special contract.

(j) *Jamshed v Burgerji* (1916) 1 L R 43 I A 26, 40 Bom 269, 32 I C 46 followed, *Mahadeo v Varain* (1919—20) 24 C W N 330, 57 I C 121, *Sadiq Hussain v Inup Singh* (1923) 4 Lah 327, 61 I C 91, A I R 1924 Lah 154, *Kanshi Lam v Day Nath* (1926) 98 I C 870.

(k) *Samapuri Chhar v Silaravann chariar* (1919) 42 Mad 802, *Maung Hala v Maung Shwe C n* (1923) 11 Ind 472, 82 I C 610, A I R 1924 Ind 57.

(l) *Feuler v Sals* (1871) 4 C I D 239, 219 per Cotton J.

(m) *Vorrington v Weight* (1843) 115 U S 159.

(n) *Sale of Goods Act 1899* s 10.

(o) *Lord Cairns in Innes v Mack* (1877) 2 App Ca at p 493.

held that the very circumstance that the defendant asked for extension of the time showed that time was intended to be of the essence of the contract, and that the plaintiff was therefore justified in refusing to accept the elephant on the 11th October and was entitled to damages for breach of the contract (p) Where a contract for the sale of goods provides for delivery to be taken by the buyer within a specified period, and reserves liberty to the seller, if delivery is not taken within the fixed period, to sell the goods on the buyer's account and at his risk, the mere fact that the contract contains a clause that after the expiry of that period the goods shall remain at the buyer's risk will not take the case out of the general rule that in mercantile contract time is of the essence of the contract (q) Again, on a sale of goods notoriously subject to rapid fluctuations of market price, the time of delivery is of the essence (r)

Either party's general right to have the contract performed within a reasonable time according to the circumstances is, of course, unaffected by the fact of time not being of the essence, and in case of unnecessary delay by one party the other may give him notice fixing a reasonable time after the expiration of which he will treat the contract as at an end (s), and where there has been inordinate delay on both sides, it may be inferred that the contract has been abandoned, although no such notice has been given (t) Also parties may bind themselves to use special diligence in completion without naming any particular date, for example, by the words 'as soon as possible,' which means within a reasonable time, with an undertaking to do the thing in the shortest practicable time according to the usual course of properly conducted business (u)

(p) *Bhisdar Chandra v Betts* (1915) 22 Cal L J 566 33 I C 347

(q) *Delhi Cloth Mills Co Ltd v Kanha* (1913) Punj Rec no 80 p 285

(r) *Balaram & Co Firm v Gounda Chetty* (1920) 49 Mad L J 200 91 I C 257 1 I R 1920 Mad 1232

(s) *Stickney v Keeble* [1915] A C 386 Cases of this class do not really come within the present section as observed in *Burn & Co Ltd v Thakur Shahab Sree Lulharsjee* (1923) 28 C W N 104, 83 I C 260, affirmed 90 I C 52 A I R 1923 P C 168 On the other hand a

party to a contract in which time is of the essence may be entitled to relief against forfeiture of payments already made on proper terms although not entitled to specific performance *Steedman v Drinkle* (1916) A C 275 (J C), *Muhammad Habib Ullah v Bird & Co* (1921) L R 48 I A 175 43 All 257, 63 I C 589 A I R 1922 P C 178

(t) *Pearl Mill Co v Iry Tannery Co* [1919] I K B 78 All the circumstances must, of course be considered

(u) *Hydraulic Engineering Co v McHaffie* (1878) 4 Q B Div 670, 673

6. The section applies to all cases of reciprocal promises, including contracts for the sale of goods whether the property in the goods sold has or has not passed to the purchaser. Thus in a Calcutta case (v) where time was of the essence of the contract, and the vendor rescinded the contract, it was contended for the buyer that, the property in the goods sold having passed to him, this section did not apply, and the vendor was not entitled to put an end to the contract, but that his only remedy was to resell the goods under s 107. It was held that s 107 declared only one of the remedies which the vendor had on breach of the contract by the purchaser, and that the vendor was entitled to the benefit of s 55.

It would seem that the provisions of this section apply to consent decrees (w).

"The contract becomes voidable at the option of the promisee"—A agrees to sell and deliver 6 candies of cotton to B on 12th July, 1909. A fails to deliver the goods on 12th July. On 4th September, 1909, B writes to A stating that if A failed to deliver the cotton within a week he will claim damages according to the market rate at the date of the letter. A takes no notice of this letter. On 3rd October, 1909, B writes another letter to A stating that as A had failed to deliver the goods, he would claim damages on the footing of the market rate at the date of the second letter. B is not entitled to damages on that footing, but to the difference between the contract rate and the market rate on 12th July, 1909, the latter being the date of the breach. The present section does not enable a promisee to keep alive a broken contract in the hope of being able to recover heavier damages for its breach. It is immaterial that no notice was given by A to B that the contract was at an end (x).

## 56.—An agreement to do an act impossible in itself

Agreement to do impossible act is void

(1) *Buldeo Doss v Howe* (1880) 6 Cal 64

(w) See *Dhagwant Gopal v Appaji* (1916) 18 Bom L R 803, *Parbhu Ram v Jhalo Kuer* (1917) 2 Pat 1 J

520, 522, 42 L C 408. *Shanker Gid  
Lalum v Radhaji Premji* (1923) 47 Bom  
507, 70 L C 226. A I R 1923 Bom 411  
(z) *Muthayya Manuvaran v Latha*  
(1914) 37 Mad 412, 14 L C 253

## IMPOSSIBILITY OF PERFORMANCE.

Contract to do act afterwards becoming impossible or unlawful

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non performance of act known to be impossible or unlawful

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise (y)

### Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void.

(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d) A contracts to take in cargo for B at a foreign port. A & Government afterwards declare war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract on those occasions becomes void.

**Impossibility in general.**—Nothing resembling this section has been found among the materials known to have been used by the framers of the Act. It varies the Common Law to a large extent, and moreover the Act lays down positive rules of law on questions which English and American Courts have of late more and more tended to regard as matters of construction depending on the true intention of the parties. English authorities, therefore, can be of very

(y) This section was elaborately discussed in *Hussainbhoy Karimji v Haridas* (1927) 105 I C 319, A I R 1928 Sind 21, with comparison of English authorities on frustration. The case itself was simple contract for delivery by ship within limited time, shipping

not procurable by reason of war requisition. The section does not, of course, enable a party to take advantage of impossibility caused by his own default. *Benarasi Prashad v Mohiuddin Ahmad* (1924) 3 Pat 581 78 I C 723 A I R 1924 Pat 586

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| (w) <i>See Bhagwant Gopal v Appaji</i> (1916) 18 Bom L R 803 <i>Parbhu</i>         | <i>Naum v Paanji Premji</i> (1923) 47 Bom 607, 201 C 226 A I R 1923 Bom 411 |
| <i>Jam v Jhalo Kurr</i> (1917) 2 Pat 1 J   | (x) <i>Muthaya Maniagaran v Lilla</i> (1914) 37 Mal 412 14 I C 253          |

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## THE INDIAN CONTRACT ACT.

little use as guides to the literal application of this section. The tendency, however, is to follow their spirit.

With regard to the first paragraph, the result is the same as in England. In the Common Law we may say that parties who purport to agree for the doing of something obviously impossible must be deemed not to be serious or not to understand what they are doing, also (but less aptly) that the law cannot regard a promise to do something obviously impossible as of any value, and such a promise is therefore no consideration. "Impossible in itself" seems to mean impossible in the nature of things. The case of performance being at the date of the agreement impossible by reason of the non-existence of the subject-matter of the contract has been dealt with under the head of Mistake (s. 20 p. 131 above).

The second paragraph has the effect of turning limited exceptions into a general rule. By the Common Law a man who promises without qualification is bound by the terms of his promise if he is bound at all. If the parties do not mean their agreement to be unconditional it is for them to qualify it by such conditions as they think fit. But a condition need not always be expressed in words, there are conditions which may be implied from the nature of the transaction. And in certain cases where an event making performance impossible is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made (1) performance or further performance of the promise as the case may be is excused. On this principle a promise is discharged if without the promisor's fault (1) performance is rendered impossible by law (2), (2) a specific subject-matter assumed by the parties to exist or continue in existence is accidentally destroyed or fails to be produced (a) or an event or state of things assumed as the foundation of the contract does not happen or fails to exist although performance of the contract according to its terms may be literally possible (b).

(1) *Early v. De Crespigny* (1879) 11 R. 4 Q. B. at p. 185.

(a) *Taylor v. Caldwell* (1863) 3 B. & S. 8. 189 R. R. 573. *Hocell v. Compant* (1870) 1 Q. B. D. 25. *Amj. l. Mon Jandaz v. Durysprawl De' p'oval* (1870) 11 C. W. N. 703. 58 I. C. 1.

(b) *Krell v. Henry* [1893] 2 K. B. 1. C. A. But failure of a condition which the parties did not know of and therefore cannot have regarded as material will not discharge the contract. *Turn P. & Co. v. T. B. A. & Co.* (1915) 2 K. B. 467. C. A. On the facts and view of the whole matter see the next section.

(3) the promise was to perform something in person, and the promisor dies or is disabled by sickness or misadventure (c)

In the last named class of cases a disabled promisor must give the best practicable notice to the promisee and the promisee has the reciprocal right of rescinding the contract if it is a continuing contract and the disability makes it as a whole impossible of performance though some part might afterwards be performed, this on the ground not of breach of contract which there has not been but that the consideration has failed. In such a case the promisor cannot show that he was ready and willing to perform his promise (d). These rules have no bearing on cases where the parties have contemplated and provided for the contingency. In such cases the Court has only to construe the terms of their agreement (e).

Having regard to the unqualified language of the Act it seems useless to enter at more length on the distinctions observed in English law. The illustrations do not, indeed appear to go beyond English authority, but this cannot detract from the generality of the enacting words. There is no reason to suppose that a broad simplification of the English rules was not intended, nor does it appear that any inconvenience has ensued or is to be expected. It is to be observed on the other hand, that some of the English cases could not be decided in the same way under this section without straining the language. H agreed to hire the use of K's rooms in London on the days of 26th and 27th June 1902 for the purpose of seeing the intended coronation processions. By reason of the King's illness no procession took place on either of those days. It was held that K could not recover the balance of the agreed rent as the taking place of the processions "was regarded by both contracting parties as the foundation of the contract" (f). Here it remained quite possible for K to lease the use of the rooms to H and for H to use them: it was only the object of the act contracted for that had failed, and that object was not mentioned in the contract itself though H took the rooms in consequence of seeing an announcement posted up in them that

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chapter on Conditions (ch vii) in 1 Q B Div 410  
 Pollock on Contract 9th ed (e) *Elliott v Crutchley* [1904] 1 K. B  
 (c) *Robinson v Darison* (1871) L R 565 C 4, affirmed in H L [1906]  
 6 Ex 260 A C 7  
 (d) *Poussard v Spens & Pons* (1876) (f) *Arell v Henry* [1903] 2 K. B 740

windows to view the coronation processions were to be let. In India such a case would, perhaps, fall more appropriately under s 32. Illustration (a) raises a curious little question. If A agrees with B to discover by magic a treasure supposed to be buried within certain limits at a spot not exactly known, and, after performing magic rites, does by good fortune discover the treasure, and A and B both believe that the magic was efficacious, can A recover any reward from B, and if so, under the agreement by rejecting the specification of means to be employed as immaterial, or under s 70 of the Act, or how otherwise?

**Stoppage of work by strike.**—A strike of the workmen employed in executing work under a contract does not of itself make performance impossible for the purpose of this section (g)

**Frustration of Adventure—War conditions**—The English rules as to discharge of contracts by “frustration of adventure” (a term chiefly used in shipping cases, with “frustration of voyage” as a synonym) have been applied in new directions in cases arising out of the war of 1914. A full account is impracticable here (h). Recent authority however, has made it clearer than ever that the literal possibility or otherwise of executing the agreement according to its terms is not an adequate test. It has to be considered whether performance according to the true governing intention of the parties remains possible (i), and for this purpose the Courts regard the duration of war as an indefinite time (j). But a temporary interruption (such as requisition of a ship for transport of troops) does not necessarily determine the contract (k). However, the extension of the former

(g) *Hari Laxman v Secy of State* (1927) 2 Bom 142 108 I C 19 A I R 1928 Bom 61

(h) For details see H Campbell *The Law of War and Contract* (London Bombay, &c Oxford Univ Press, 1918), pp 70 265 *seq.*, 284 *seq.*, and McNair *Legal Effects of War* (Cambridge Univ Press 1920)

(i) Where goods were seized as prize and then released and transhipped and arrived two years late, it was held that the arrival was not such as was contemplated by the parties. *Gouri Shankar Agarwalla v H P Motra* (1921—2) 26

C W N 573 70 I C 370

(j) *Horlock v Beal* [1916] 1 A C 457

(k) *Tamplin SS Co v Anglo Mexican &c Co* [1916] 2 A C 397. It may do so if the contract is for shipment within a limited time and within that time no other tonnage can be found at a proper port. *Benoit v Leuthomme* (1924) 48 Mad 538, 87 I C 641 A I R 1925 Mad 626 (really on the construction of an express *force majeure* clause). Cf *Husseinbhai Karimji v Haridas* (1927) 105 I C 310 A I R 1924 Sind 21

rules by *Arrell v Henry* (see p 329 above) now stands as applicable to contracts of all sorts within limits not yet thoroughly defined, as McCordie J has pointed out in a careful analysis (l) There is no general rule (as suggested by some dicta) that it does not apply to a sale of unascertained goods (m)

**Frustration by Total or Partial Prohibition**—In a state of war many contracts are affected by performance or further performance becoming wholly or in part unlawful This may be under the general rules against intercourse with the enemy, or may be the result of express executive orders issued under powers of emergency legislation In principle the question is the same that we have noted above, whether the new state of things is such as the parties provided for or contemplated, and whether further performance so far as the prohibition is not total, or when it is removed would really be performance of the same contract Compulsory suspension of an engineering contract on a large scale, in order to direct the labour to producing munitions of war has been held to discharge the contractors (n) So too, a contract to deliver goods may be frustrated by emergency regulations restricting transport (o) Where goods the subject of a specific contract of sale in which the property had not yet passed to the buyer were lawfully taken for the public service the seller was excused from delivery (p) But a continuing contract is not discharged by a prohibitive regulation which may be determined or varied during the war and leaves a substantial part of the contract capable of execution (q)

It must not be assumed that the consequences of a contract being discharged for any of the above mentioned reasons will be the same in India as they would have been in England, see on s 65 below

(l) *Blackburn Bobbin Co v T W Allen & Sons* [1918] 1 K B 540 545 Affd in C A [1918] 2 K B 467

(m) *Re Badische Co etc* [1921] 2 Ch 331 381 per Russell J In this case the effects of war on contracts lawfully made in time of peace the performance of which would or might involve intercourse with enemies are elaborately discussed The facts do not admit of summary statement

(n) *Metropolitan Water Board v Dick Kerr & Co* [1918] A C 119

(o) *Sannadhi Gundayya v Subbayya* (1926) 51 Mad L J 663 99 I C 459 A I R 1927 Mad 89

(p) *Re Shipton Inderson & Co and Harrison Bros & Co* [1915] 3 K B 676

(q) *Leiston Gas Co v Leiston cum Sizewell Urban Council* [1916] 2 K B 428 A C

“Becomes impossible.”—The Indian decisions merely illustrate what amounts to supervening impossibility or illegality within the meaning of the second paragraph

In a suit for damages for breach of a contract against a Hindu father to give his minor daughter in marriage to the plaintiff, it was held that the performance of the contract had not become impossible simply because the girl had declared her unwillingness to marry the plaintiff, and the defendant had declared that he could not compel her to change her mind (r) In the course of the judgment the Court said “The act is neither impossible in itself, nor impracticable in the ordinary sense of the term Though physical force cannot for one moment be thought of, it is no doubt the duty of defendant according to the terms of his contract to use to the utmost his persuasive powers and his position as parent in order to induce his daughter to be married” More generally, if a man chooses to answer for the voluntary act of a third person, and does not in terms limit his obligation to using his best endeavours, or the like, there is no reason in law or justice why he should not be held to warrant his ability to procure that act Similarly, where the parties to a suit agreed that the plaintiff and his younger brother were to execute a sale deed within a week conveying the property in dispute in the suit to the defendant for a certain sum, and, in default, the suit was to be dismissed, it was held that the younger brother's refusal to join in executing the deed did not make the performance of the agreement by the plaintiff impossible within the meaning of this section (s) An agreement to sell a specified quantity of *dhotis* to be manufactured at a particular mill “to be taken delivery of as and when the same may be received from the mills,” cannot be read as meaning “if and when,” especially when a time is named for the completion of delivery, and the failure of the mills to produce the goods is no excuse The doctrine of frustration does not extend to the case of a third person on whose work the defendant relied preferring to work for some one else during the material time (t) Where A agreed to cultivate indigo for B for a certain

(r) *Purshotamdas Tribhorandas v Bulsen* (1922) 50 I A 9, 47 B m 314.  
*Purshotamdas Mangaldas* (1896) 21 72 I C 483 A I R 1923 P C 51.  
 Bom 23 see also *Ekatal v Aalyanrai* (1921) 23  
 Bom I R 547 45 Bom 1222 63 I C  
 17 Mad L J 37 932 and cases collected in *Ekatal v Aalyanrai*  
 (t) *Hurnanrais Fulchand v Pragdas Ram v Ranyanrai* (1921) 37 Cal I J

number of years in certain lands of which A was a sub tenant and subsequently during the continuance of the contract A lost possession of the lands, as his immediate landlord failed to pay rent, and was in consequence ejected, it was held that the case came within the provisions of the second paragraph of this section and that the mere fact that A might have paid up the rent and thus saved the land and himself as his tenant from ejection did not make the event such an one as A could have prevented (u)

In a Bombay case (t) the defendant, who was a stone contractor, agreed to pay to the plaintiff Rs 329 per month for one year for permission to the defendant to blast stones and carry on the work of quarrying on plaintiff's land. It was also agreed that the defendant should obtain at his own expense the necessary license for blasting stones. At the time of the agreement the defendant had a license from the authorities, but it expired during the term of the agreement, and the authorities refused to renew it, the defendant thereupon declined to pay the rent for the unexpired period of the agreement. In a suit by the plaintiff for the rent it was held that the question was one of construction and that looking at the nature of the contract it must be taken to have been the intention of the parties that the monthly payment should only be payable so long as quarrying was permitted by the authorities. The present section was considered to have nothing to do with the case (w). Obviously the performance did not become impossible as there was no agreement to blast any stone at all.

**Commercial impossibility**—The impossibility referred to in the second clause of this section does not include what is called commercial impossibility. A contract therefore, to supply freight cannot be said to become impossible within the meaning of that clause merely because the freight could not be procured except at an exorbitant price (x). So a contractor for bridge tolls has no legal claim for compensation

151 63 I C 267. In the principal case it was suggested that the mills had been requisitioned by the Government which might have been a good defence but there was no evidence of this.

(u) *Inder Pershad Singh v Campbell* (1881) 7 Cal 474.

(t) *Goculdas Madhaji v Varsu Yen* (1880) 13 Bom 670.

(w) 13 Bom at p 635 Sargent C J arg.

(x) *Karl Ettlinger v Chagandas* (1916) 40 Bom 301 310-311 33 I C 205.

against the District Board if a considerable part but not the whole of the traffic is prohibited by a Government ordinance (y)

**"Becomes unlawful."**—By a contract made with the plaintiffs the defendants agreed to carry from Bombay to Jedda in their steamer 500 pilgrims who were about to arrive in Bombay from Singapore in the plaintiffs' ship. The pilgrims arrived in Bombay, but the defendants refused to receive them on board their steamer on the ground that during the voyage of the plaintiffs' ship to Bombay there had been an outbreak of small pox on board, and that the pilgrims had been in close contact with those who had been suffering from the disease, and that the performance of the contract had under the circumstances become unlawful, having regard to the provisions of s 269 of the Indian Penal Code (Act XLV of 1860). That section provides that whoever unlawfully and negligently does any act which is, or which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment. It was held that the carrying of the pilgrims in the defendants' steamer would not have been in contravention of any law or regulation having the force of law, nor would it have been a negligent act on their part to do so, and that s 269, therefore, did not apply, and that the defendants were bound to perform the contract (z).

Certain later statutory enactments further define the effect of the present section. The Specific Relief Act I of 1877, s 13 provides (with abundant caution see commentary thereon in its place below) that, notwithstanding anything contained in s 56 of the Contract Act a contract is not wholly impossible of performance because a portion of its subject matter existing at its date, has ceased to exist at the time of the performance. The Transfer of Property Act II of 1882 s 108 provides as to property let on lease that if by fire, tempest, or flood or violence of an army or of a mob or other irresistible force any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let the lease shall at the option of the lessee be void.

(y) *B. B. Sankhakar & Sankhappa v. The District Board, Bombay* (1924) 86 I C 362.  
(z) *Bombay and Jedda Steam Navigation Co. Ltd. v. The District Board, Bombay* (1924) 86 I C 362.

**Refund.**—Where a contract, after it is made, becomes impossible, the party who has received any advantage under it is bound to restore it to the other party under s 65 below. A buys freight from B for 2,500 bales of cotton on a ship belonging to B to be carried from Bombay to Genoa. The freight is paid in advance and the goods are put on board the ship. While the ship is still lying in the harbour, the export of cotton to Genoa is prohibited by orders of the Government, and the voyage is abandoned. A is entitled under s 65 to recover from B the freight paid in advance. This right is not affected even if B is a common carrier (a). Similarly, where a contract becomes unlawful owing to the outbreak of war, either party is entitled under s 65 to recover from the other any deposit made by him as a security for the due performance of the contract (b).

**Dealings with Enemies**—Since 1914 the question has often arisen whether a contract lawfully made before the war comes within this section on the ground that performance or complete performance would involve dealing (c) with enemies and therefore would be unlawful under s 23. A large proportion of these cases are on contracts “for the sale of goods to be performed by the delivery of documents” (d) in the form known as “c i f”. An authoritative statement of what that form implies is subjoined in a note (e).

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(a) *Boggiano & Co v The Arab Steamers Co, Ltd* (1916) 40 Bom 529 33 I C 536 followed *Gandha Horliak v Janoo Hassan* (1925) 49 Mad 200 91 I C 780. A I R 1926 Mad 175.

(b) *Textile Manfg Co Ltd v Solonon Brothers* (1916) 40 Bom 570 33 I C 353.

(c) Trading is too narrow: a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country. Judgment of Lord Chelmsford in *Willes v Esposito & Lowden* (1837) 7 F & B at p 779 110 R R at p 823.

(d) *Banks LJ Aurling & Co v Elythe Green, Jourdain & Co* [1916] 1 K B at p 510, cf *Warrington LJ*, p 514.

(e) A seller under a contract of sale

containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J in *Ireland v Livingston* (L R 5 H L at p 506) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of

## THE INDIAN CONTRACT ACT

The governing principle was laid down in a case arising out of the Crimean War by Mr Justice Willes "As to the mode of operation of war upon contracts of affreightment made before, but which remain unexecuted at, the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it" (f) In practice we have to ascertain whether the further execution of a given contract has become unlawful as involving dealing with enemies or otherwise, or in a judicial sense impossible, and this is not always easy Declaration of war is regularly accompanied by a Royal Proclamation against trading with the enemy This appears to be only in affirmance of the common law, it may however, and commonly does contain relaxations and dispensations After a declaration of war a contract may stand dissolved on the ground now under consideration although both parties are British subjects One British firm contracted with another to sell goods, deliverable to the buyer or assigns in Hamburg and for payment at Liverpool in exchange for shipping documents The goods were shipped in June 1914, for Hamburg in a German ship, the bill of lading provided that questions arising under it were to be decided there by German law On 5th August, the day following the declaration of war the ship having put in it was stated, at a neutral port the sellers tendered the documents and the buyers refused them Held that delivery according to the contract would have been against the King's proclamation as being delivery to residents in enemy country, and therefore the refusal was good (g)

This authority has been followed in Indian cases where the facts were varied by the goods being despatched or intended so to be not to Germany but from Germany to India We have the simple case of a cargo shipped from Hamburg to India, bill of lading tendered after

the goods provided they are in conformity with the contract, shall be delivered on board ship at the port of shipment It follows that against tender of the documents the bill of lading invoice and policy of insurance which complete delivery in accordance with that agreement the buyer cannot be held any longer to pay the price In this case payment before the arrival of the goods

in this country was involved per Hamilton J. per Lord Sumner in *111 Bros v F. C. C. (1911)* 1 K. B. at p. 277

(f) *Esposito v. Wolstenholme & Co.* at p. 783 110 L. J. at 187

(g) *D. N. S. v. F. C. C.* 111 L. J. at 187 (1911) 2 C. 331 333 337

British proclamation, refusal of tender justified (h), the goods having become enemy property at the outbreak of war. Another straightforward example is that of a consignment sold by the Madras agent of an enemy firm: the buyer accepted a draft for the price, and demanded first the documents and then the goods on arrival at Madras: the agency was held to have been determined by the declaration of war, so that no contract was ever formed (i).

A less simple question is "whether when, before the outbreak of war, goods have been sold by one English firm to another on a c i f contract and shipped on a German ship to a neutral port, the seller after the outbreak of the war is entitled to tender, in one case the German bill of lading in the other case the German bill of lading and the German policy of insurance, and claim the price?" (j). The exact legal point as stated in the Court of Appeal is "upon whom the loss is to fall where documents which were originally valid have become invalid before they were tendered" (k). It is decided in England that the documents the buyer is bound to accept are effective shipping documents, and not such as are only evidence of a contract now dissolved by one party having become an alien enemy. Special terms might throw this risk on the buyer, but the usual terms of a c i f contract do not. This ruling has been followed in India. In *Marshal & Co v Naginchand* (l) goods were shipped to Bombay under a c i f contract from a German port and on board a German ship before the declaration of war: the vendor, a Glasgow firm, drew a bill of exchange upon the purchaser on 9th November, 1914, which was accepted in Bombay (m). The bill became payable on 12th January, 1915, and the vendor sued for the amount. He was held not entitled to recover, as the bill of lading had ceased to be an operative legal document before it was tendered and the consideration for the acceptance of the bill of exchange had, therefore, failed.

Where, on the other hand, a German seller's draft on the buyer

(h) *Assam Issac v Haji Sulanali* (1916) 40 Bom 11, 28 I C 433

(i) *Soorthingje v Mahomed* (1917) 32 Mad L J 146, 40 I C 570

(j) *Scrutton J, Schneider & Co v Burgett & Neusam* [1915] 2 K B at p 385

(k) *Swinfen Eady LJ, Karberg &*

*Co v Blythe, Green Jourdain & Co* [1916] 1 K B 490, 501

(l) (1916) 42 Bom 473, 37 I C 644

(m) It is not clear from the report whether the bill of lading was tendered to the purchaser at the time of acceptance or subsequently, nor whether he ever got the bill of lading

at 30 days' sight was drawn, purchased by British subjects in London, and presented and accepted at Bombay before the war, the buyer was held bound to pay (n). The case was complicated by the defendants' contention that the acceptance was qualified by the condition that the plaintiffs, when tendering the documents to the defendants, should put them in a position to get delivery of the goods (o), and that this could not be lawfully performed. Now in point of fact the ship carrying the goods reached Bombay just before the outbreak of war, left Bombay to avoid capture and took shelter in the neutral port of Marmagoa, where she was lying at the date of suit brought, and under a proclamation of December, 1914, British consignees were free to take delivery of goods from enemy ships in neutral ports. Thus both branches of the defence failed - actual payment of the bill, from one British subject to another, at the due date and after declaration of war, was of course in no way unlawful.

In *Abdul Razac v Khandi Row* (p) a contract was made in August, 1914, after the outbreak of war, between merchants at Ambur and importers of German dyes whereby the latter (defendants) agreed to sell and deliver to the former (plaintiffs) certain casks of dye already shipped from Germany. As the defendants could not lawfully take up and pay for the goods, they could not lawfully agree to sell and deliver them to the plaintiffs (q). The case has another aspect, perhaps of more interest. The German S S *Barenfels* carrying the dyes in question was captured in October, 1914, and taken into Alexandria for condemnation and subsequently condemned as prize of war in September, 1915 (r). In the meantime the defendants got the goods released on payment of double the invoice value, agreeing to treat it

(n) *Motishaw & Co v The Mercantile Bank of India* (1917) 41 Bom 560, 37 I C 274

(o) It is difficult to see how this could be maintained, but, as pointed out by Scott C J, that question would have been governed by the Negotiable Instruments Act.

(p) (1918) 41 Mad 225, 40 I C 851

(q) *Karberg's Case* p 375, above. It was unsuccessfully contended that there was an absolute contract for the delivery of goods answering the description even if no such goods arrived by a ship named

(the report is not too clear as to this argument)

(r) The Prize Court in Egypt held in the same case, that where a German firm consigned goods to a British firm at Colombo, drew on that firm for the price, and discounted the draft with a British bank, all this before the war, the acceptance of the draft after the war by the buyers was an act of trading with the enemy. See *Campbell on the Law of War and Contract* 175-187. We agree with Mr. Campbell that this goes too far.

as their sale price in case of their eventual condemnation. It was held (s) that the condemnation by the Prize Court related back to the date of seizure and divested the ownership of the goods as from that date. The goods, therefore, came to the defendants as purchasers from the Crown and they were not bound to deliver them to the plaintiffs.

In *Madhoram v. Sell* (t) we have a rather peculiar state of facts. The contract was between two Calcutta firms for sale of steel bars "c i f c i free Hoogly," by shipments in June, July, August, 1914. Goods were shipped under this contract (u) from Antwerp per S S *Steinturm*, a German ship which was at sea when war was declared, she carried a general cargo for Madras, Calcutta and Chittagong. The ship was captured by a British cruiser and taken to Colombo for adjudication. The Prize Court condemned the vessel but released the cargo, and the goods were brought to Calcutta, the place where the goods were to be delivered under the original contract by the *Steinturm*, under an order of the Prize Court made by arrangement with the Government of Ceylon which provided for delivery to consignees on payment of further freight and expenses. The purchasers were held not entitled to delivery of the goods from the vendors. The voyage from Colombo to Calcutta was in no sense a continuation of the original voyage in fulfilment of the contract of affreightment which was dissolved by the outbreak of the war, the voyage was broken up by capture so as to cause a complete defeasance of the undertaking. "The original bills of lading would be of no avail whatever, unless the consignee complied with the conditions imposed by the Prize Court" (v). Thus there was a new voyage under new conditions and delivery of the goods according to the original contract had become impossible, and the plaintiffs' suit failed although the goods had been delivered in the Hoogly from the same ship in which they were despatched and were in the defendants' control.

(s) Following *The Odessa* [1916] A C 153.

(t) (1918) 45 Cal 28 28 I C 383.

(u) The terms were not payment against documents but 45 days credit after delivery of the goods. This varia-

tion did not alter the nature of the contract apparently the only real difference between the parties related to payment of various charges.

(v) Per Mookerjee J, 45 Cal at p 58.

**57.**—Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement

Reciprocal promise to do things legal, and also other things illegal

*Illustration*

A and B agree that A shall sell B a house for 10 000 rupees, but that if B uses it as a gambling house, he shall pay A 50 000 rupees for it

The first set of reciprocal promises, namely, to sell the house, and to pay 10,000 rupees for it, is a contract

The second set is for an unlawful object namely that B may use the house as a gambling house, and is a void agreement

**Scope of the section.**—It is not easy to see what this and the following section really add to s 24 (see the commentary thereon for explanation of the principle), or why they are inserted here, but they are plain enough

This section applies to cases where the two sets of promises are distinct. When the void part of an agreement can be properly separated from the rest, the latter does not become invalid, but when the parties themselves treat transactions, void as well as valid as an integral whole, the Court also will regard them as inseparable and wholly void (u)

Compare s 16 of the Specific Relief Act (below) which declares the application of a similar but more extensive principle to specific performance

**58.**—In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced

Alternative promise, one branch being illegal

*Illustration*

A and B agree that A shall pay B 1 000 rupees for which B shall afterwards deliver to A either rice or smuggled opium

This is a valid contract to deliver rice, and a void agreement as to the opium

*Quære* whether, under the terms of this section, in case B has offered and A has accepted smuggled opium as in performance of

(u) *Davlatov v Pankov* (1884) 9 Bom 176. See also *Poonoo Bibee v Fyz* (1874) 13 B L R App 5, and *Meherally v Siderhamedas* (1883) Bom L R 682, at p 686

the agreement, A can still have an action against B for failure to deliver rice. It would seem that A, being *in pari delicto*, cannot sue, for he could not make out his case without showing an illegal transaction to which he was a party (x). The point does not seem likely to arise in practice.

## Appropriation of Payments

**59.**—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Application of payment where debt to be discharged is indicated

### Illustrations

(a) A owes B among other debts 1 000 rupees upon a promissory note which falls due on the 1st June. He owes B no other debt of that amount. On the 1st June A pays to B 1 000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B, among other debts the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

**Appropriation of Payments.**—In England “it has been considered a general rule since *Clayton’s Case* (y) that when a debtor makes a payment he may appropriate it to any debt he pleases, and the creditor must apply it accordingly” (z).

**Debt**—Where money is paid by a debtor to his creditor with express intimation that the payment is to be applied to his discharge of some particular debt, and it is received and appropriated on that account, it is not in the power of the creditor, without the assent of the debtor (not merely of one out of several who pays on behalf of all) (a), to vary the effect of the transaction by altering the appro-

(x) See *Taylor v Chester* (1869) L R 4 Q B 309, 314.

(y) (1816) 1 Mer at p 608 15 R R at p 166.

(z) Per Blackburn J, *City Discount Co v McLean* (1874) L R 9 C P 692, 700. A case of *Datenport v Reg*, decided by the Judicial Committee in 1877 (3 App Ca 115), which we have seen cited

on this section has in the present writer’s opinion, nothing whatever to do with it. The subject matter is the effect of a landlord’s receipt of rent, and the analogy, if any, is remote.

(a) The creditor, if he accepts a payment so made with a direction as to its application, must follow the direction at once, he is not free to suspend action

priation in which both the debtor and the creditor originally concurred. The same rule applies to payment of Government revenue (b). But where there is no appropriation by consent, the question arises whether the provisions of ss 59—61, relating to the appropriation of payments, which apply to the case of debts apply to arrears of revenue payable to Government. Maclean C.J. expressed the opinion that ss 59—61 of this Act do apply to transactions in relation to the realisation of land revenue (c). The point has been before the Judicial Committee, but it was not decided, as the case was one of appropriation by mutual consent, their Lordships simply observing that those sections *might perhaps have had a bearing upon the case*, if the parties had not by their own actions placed the matter beyond doubt (d). As to road cess payable under the Public Demands Recovery Act (e), it has been held to be a debt within the meaning of this section, so that the collector has no authority to appropriate payments made in liquidation of specific arrears of road cess towards previous arrears (f).

**Several distinct debts**—This section deals only with the case of several distinct debts, and does not apply where there is only one debt, though payable by instalments. Thus, where the amount of a decree was by consent made payable by five annual instalments, it was held that the decree holder was not bound to appropriate the payments to the specific instalments named by the judgment debtor (g). The amount declared to be due for principal, interest and costs in a mortgage suit under O 34 r 4, constitutes but one debt, it cannot be regarded as consisting of two debts, one on account of principal and interest and the other on account of costs (h).

and then vary the application by an agreement with the joint debtor alone. *Foster v Cletty* (1924) 2 Pan 204 82 I C 658. It is hard to see how the contrary can have been seriously argued.

(b) *Mahomed Jan v Ganga Bishun Singh* (1910) 38 Cal 537 38 I A 80 reversing S C in 33 Cal 1193.

(c) *Jogendra Mohan Sen v Uma Nath Guha* (1908) 35 Cal 636.

(d) *Mahomed Jan v Ganga Bishun Singh* (1910) 38 Cal 537 541 I R 39 I A 80 81. See further *Dasharathi Ghose*

*v Khondkar Abdul Hannan* (1927) 53 Cal 624, 105 I C 15. A I R 113. Cal 68 decided on another point.

(e) Act I of 1897 Beng Cal.

(f) *Nanlin Mitter v Lal Bahadur Varma* (1910) 14 C W N 60.

(g) *Fa al Hussein v Juman Ali* (1906) All W N 135 followed *Harrison v Hariman* (1927) 104 I C 673 A I R 1027 Bom 479.

(h) *Jagannath v Jhanna* (1914) 12 All W N 645.

60.—Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits

Application of  
payment where  
debt to be dis-  
charged is not in-  
dicated

**Creditor's right to appropriate —** 'If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor' and he may exercise that right until the very last moment and need not declare his intention in express terms (i), he may, in fact, exercise that right even when he is being examined at the trial of the case (j). This is no doubt the rule of English law, and it was assumed to be the law under the Contract Act by the High Courts of Bombay, Madras and Patna (k). In the Patna case *Atkinson J* said 'I only refer to the case of *Cory Bros & Co., Ltd v The Mecca* (l) for the purpose of showing that the law there laid down is in conformity in every respect with the enactment contained in sections 60 and 61 of the Indian Contract Act'. But the High Court of Allahabad has held that an appropriation of payment by the creditor must be made *at the time of receiving the money*, and that he cannot exercise the right of appropriation at the last moment (m). After referring to the passage in the judgment of the Master of the Rolls in *Clayton's Case* (n) relating to the Civil Law on the subject the learned Judges observed. It seems to us that what the Indian Legislature did by sections 59-61 of the Indian Contract Act was to adopt the rule of Civil Law with certain modifications. Unless the meaning

(i) Lord Macnaghten in *Cory Bros & Co v Owners of the Mecca* (1897) A C 286-293, followed *Manistj v Jameson* (1925) 5 Pat 326. 84 I C 273, A I R 1926 Pat 330.

(j) *Seymour v Pickett* (1905) 1 K B 715.

(k) *Amerchand & Co v Ramdas* (1914) 38 Bom 255 264 265, 21 I C 313 (the case was taken in appeal to the Privy Council [L R 43 I A 164 40 Bom

63) 33 I C 94] but the judgment of the High Court on this point was not challenged in argument). *Munisami Mudali v Perumal Mudali* (1919) 37 Mad L J 367 52 I C 950. *Bishin Perkash v Siddique* (1916) 1 Pat L J 474 35 I C 375.

(l) [1897] A C 286.

(m) *Kundan Lal v Jaganath* (1915) 37 All 649 30 I C 97.

(n) (1816) 1 Mer 572 601 15 R R 161.

of section 60 is that the debtor is to make his appropriation (if any) at the time of paying and the creditor is to make his appropriation (if any) at the time of receiving the money, it is difficult to conceive what is the meaning of section 61 or how it could be applied." It is no doubt true that according to the Civil Law an appropriation of payment by the creditor must be made at the time of receiving the money, but there is nothing in the language either of s 60 or s 61 which precludes the creditor from exercising the right of appropriation at the very last moment. It is submitted, with respect, that the view taken by the Allahabad High Court is an arbitrary speculation. It seems to assume that if the creditor has the right as in English law to make the appropriation at the last moment, he will do so in every case, and that there can therefore be no room for the operation of s 61. But the creditor may do nothing at all, in which case a rule is necessary for the guidance of the Courts, and s 61 provides such a rule. The rule laid down in s 61 is in conformity with the English law. Our opinion is now supported by the High Court of Lahore (o).

It is impossible to define the circumstances which may be held to indicate a special intention (p). Where the earlier in date of two debts is of a different kind and specially secured, it will not be presumed that a payment made without express directions was intended to be on account of the earlier one (q).

When a debtor passed two mortgage bonds to his creditor, one of which carried interest payable with rests, and the other carried simple interest, and the creditor appropriated payments made by the debtor to interest on the bond carrying simple interest, it was held that the creditor was entitled to apply the payments to either of the debts and that the mere reluctance of the debtor to pay compound interest before he executed the mortgage bond at such interest was no indication of the debtor's intention that his payments should be applied to that bond (r). But where by a mortgage bond the debtor agreed

(o) *Relu Mal v Ahmad* (1925) 7 Lah 17, 92 I C 917, A I R 1926 Lah 183.

(p) See *Bansi Dhar v Akhya Jam* (1890) All W N 62 where the terms of the mortgage bond, the circumstances in which it was executed, the relations of the parties and the fact that the very thing which was to be handed over to

the creditor was to be given as part security for the debt were held to constitute circumstances within the meaning of this section.

(q) *City Thermal Co v Mehar* (1941) I R 9 C P 692 700.

(r) *Jameswar Kher v Mahomed Mehd* *Hossain Khan* (1908) 26 Cal 39.

to repay the loan made to him by the creditor in kind by delivery of certain species of grain, or at his option in cash at a specified rate of interest, and the creditor applied several payments in grain made by the debtor to other antecedent debts, it was held that the creditor was not entitled to do so, as the stipulation to repay the loan by delivery of grain, combined with the absence of evidence to show that the previous debts were to be liquidated by payments of grain, was a circumstance indicating that the payment was to be applied to the debt secured by the mortgage bond (s)

**Principal and interest**—Where there is a debt carrying interest, money paid and received without any definite appropriation is to be first applied in payment of interest (t) If the debtor appropriates a payment to principal, the creditor need not accept payment on those terms, but if he does not he must return the money, if he does accept he is bound by the appropriation (u) The same rule applies to judgment debts Thus when a sum is realised on account of a decree, that amount is to be deducted from the interest and not from the principal (v) The rule is the same even if the decree be an instalment decree Thus if a decree is passed for Rs 1,500 with interest at five per cent per annum payable by three yearly instalments of Rs 500 each, and the judgment-debtor pays Rs 500 at the end of each of the three years without appropriating the payments to principal, the decree holder is entitled to appropriate Rs 75 for the interest due and the balance of Rs 425 to principal (w)

**Compositions**—Where a payment is made by way of dividend or composition for the benefit of creditors generally, the payments must, by the nature of the transaction, be rateably apportioned among the several debts, and in any question arising with third parties, as, for example, sureties for any portion of the debts, every payment is deemed to be specifically appropriated “as so much in each and every

(s) *Sungut Lal v Baijnath Roy* (1886) 13 Cal 164

(t) *Venkatrao Appa Row v Parthasarathi Appa Row* (1921) L R 48 I A 150 153 44 Mad 570 573, 61 I C 31, stated as an old settled rule

(u) *Nemi Chand v Radha Kishen* (1921) 48 Cal 839 841, 63 I C 904 (Jud

Comm from Ajmer Nerwara) Earlier statements to the same effect are now omitted as superfluous

(v) *Gooroo Dass Dutt v Ooma Churn Roy* (1874) 22 W R 525

(w) Per Richardson J in *Biswanath v Someswar* (1917) 21 C W N 1055, 41 I C 348 (Walmesley J *dubitante*)

pound of the whole amount of the debt" (2) See further, as to the result of this, notes on ss 128, 140, pp 469—473, 496—498, below

*Debt barred by the law of limitation*—Where no appropriation is made by the debtor, the creditor may apply the payment to any lawful debt, though barred by the law of limitation This frequently happens where there is a running account extending over several years The creditor may in such a case appropriate the payments to the earliest items barred by limitation and may sue for such of the balance as is not so barred (y)

61.—Where neither party makes any appropriation, the

Application of  
payment where  
neither party ap-  
propriates

payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits If the debts are of equal standing, the payment shall be applied in discharge of each proportionably

*Scope of the section*—This section must be read continuously with s 60 It must be carefully observed that it does not lay down a strict rule of law, but only a rule to be applied in the absence of anything to show the intention of the parties Not only any express agreement, but the mode of dealing of the parties must be looked to On the other hand, the circumstances may show that accounts which it was at a party's option to treat as separate were, in fact, treated as continuous, and then payments will be appropriated to the earliest unpaid item of the combined account (z)

The English rule had been followed in India before the enactment of the Contract Act (a) The rule is subject to certain modifications in cases where trust funds capable of identification have been mixed with the trustee's private current account But these belong to their own special subject (b)

(z) *Bardwell v Lydall* (1831) 7 Bing

480, 491, 33 R R 540 545

(y) *Bishun Pershad v Siddique* (1916)

1 Pat L J 474

(z) *Hooper v Keay* (1876) 1 Q B Div

178 (current account with continuing partner after dissolution of firm)

(a) *Mooneappa v Venkatasayana*

(1870) 6 M H C 32, *Hirala Kar v*

*appa v Gadiga Mudappa* (1871) 6

M H C 107

(b) See *Je Hollett's Estate* (1860) 13

Ch Div 606; *Pe Stanning* [1893] 2 Ch

"Where neither party makes any appropriation"—See notes on ss. 60, p 343, above

### *Contracts which need not be Performed*

62.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Effect of novation,  
rescission  
and alteration of  
contract

#### *Illustrations*

(a) A owes money to B under a contract. It is agreed between A, B, and C that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is at an end and a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into. [For a less simple illustration of the principle that all parties must concur, see *Benkalanarayana v Lalshimbayamma* (1929) 116 I C 129, A I R 1929 Mad 309.]

**Novation.**—The meaning of "novation," the term used in the marginal note to this section, and now the accepted catchword for its subject matter, has been thus defined in the House of Lords: "that, there being a contract in existence, some new contract is substituted for it either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business usually taking over the assets, and if, in that case, they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes (sic) a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and on the other hand, that they promise to pay him for that consideration" (c).

For the case of a novation on a change in the constitution of a

firm it is declared in England by s 17, sub s 3, of the Partnership Act, 1890, that "a retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted" This adds nothing to the law as already settled (*d*)

It has to be considered in every case not only whether a new debtor has consented to assume liability, but whether the creditor has agreed to accept his liability in substitution of the original debtor's. In some circumstances the creditor may be entitled to sue the retiring or the incoming partner in a firm at his option, mere continuing to deal with the firm as reconstituted will not preclude him from suing his original debtor (*e*) Novation is not consistent with the original debtor remaining liable in any form (*f*), it requires as an essential element that the right against the original contractor shall be relinquished, and the liability of the new contracting party accepted in his place (*g*)

It is an elementary rule that trustees and others administering money of which they are not the beneficial owners are not entitled to make a novation (which is to accept one security or liability instead of another) except so far as they are authorised by the trusts under which they act (*h*) The executor of a deceased partner may agree with the surviving partners to convert the partnership into a limited company, and to accept fully paid up shares in the company in lieu of the testator's share Such an agreement is valid and binding on the estate of the testator (*i*)

Election to accept the sole liability of new or surviving partners in a firm does not need very strong proof, but merely ambiguous acts

(*d*) See *Rolfe v Flower* (1805) 1 R 1 P C 27, *Dilborough v Holmes* (1870) 5 Ch D 235

(*e*) *Scarf v Jardine* (1852) 7 App Ca 345, 351 He cannot, however sue both and his choice when made is final

(*f*) See *Commercial Bank of Tasmania v Jones* [1893] A C 313, and cf *Ferry v National Prov Bank of England* [1910] 1 Ch 461, especially per Buckley LJ

(*g*) *Naf mulla v Channappa* (1903)

5 Bom I R 617, *Muhammad Shah v Sarauti* (1883) All W N 231 Accord  
ingly a formal instrument is not annulled by a mere agreement to substitute something else for it at a future date *Angin Lal v Siran Behari Lal* (1929) All L J 127, 121 I C 221, A I R 1029 All 503

(*h*) *Smith v Patrick* [1901] A C 262

(*i*) *Jamsetji v Hieji'has* (1913) 37 Bom 158 167-169

will not do. One of two bankers in partnership died. A customer, knowing of this, drew out part of a sum standing in his name on deposit account, and took, according to the usual course, a fresh deposit note for the amount left in, signed by a cashier on behalf of the firm. This was no proof of novation (j). Another customer also with the knowledge of the former partner's death, transferred a sum of money from current to deposit account (after consulting the surviving partner about investing it) and took a receipt signed by the surviving partner on behalf of the firm. This was a new contract with the surviving partner alone (l). A advanced Rs 50 000 to a firm consisting of three partners. The sum of Rs 50 000 was made up partly of securities handed over by A to the firm and partly of cash. The firm passed a note to A promising to return the securities and repay the cash with interest at 6 per cent per annum payable every six months. Thereafter one of the partners died, and A accepted from the surviving partners a promissory note in the firm's name for Rs 50,000 to be paid in cash with interest at the same rate but not payable with six months rests. This was a new contract with the surviving partners alone (l).

The High Court of Calcutta held the present section not to apply where the agreement to substitute a new contract for the original one is made after the breach of the original contract. The plaintiff sued the defendant to recover a sum of Rs 1,100 due on a bond. It was found that *after* the due date of the bond the plaintiff agreed to accept from the defendant in satisfaction of the bond Rs 400 in cash and a fresh bond for Rs 700 (not the mere promise to pay the Rs 400 and to give a bond for Rs 700). The defendant failed to pay the Rs 400 and to pass the bond and the plaintiff sued to recover the amount of the original bond. It was found that the plaintiff did not intend to accept the naked promise to pay Rs 400 and to give a bond for Rs 700. For the defendant it was contended that the subsequent agreement had made a novation. The Court, however, held that s 62 did not apply, as the subsequent agreement was entered into after the breach of the original contract, and that the defendant, having failed to perform the satisfaction which he had promised to give, remained

(j) *Re Head* [1893] 3 Ch 426

(l) *Markandras v Virendras* (1917)

(k) *Re Head* (No 2) [1894] 2 Ch 236

19 Bom L R 837, 843-844 42 I C

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(g) *Nelson v. Connors* (1883)

5 Bom L R 617. *Muhammad Shah v Saruta* (1883) All W N 34. Accord only a formal instrument is not annulled by a mere agreement to substitute something else for it at a future date. *Amra Lal v Sajan Behari Lal* (1909) All I J 127. 121 I C 221. A I R 1910 All 503.

(h) *Smith v Lister* (1901) A C 252.

(i) *Jamsetji v Hyje Khan* (1913) 37 Bom 154. 167-168.

## NOVATION.

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(l) *Re Head* (No 2) [1894] 2 Ch 236

19 Bom L R 837, 843-844, 42 I C 815.

liable on the original contract (m) In Madras Seshagiri Iyer J has taken the same view (n), but Kumaraswami Sastri J expressed the opinion that the section applies even though the new agreement is made after breach of the original agreement, and his opinion is followed by the Madras High Court (o) The correct view, it is submitted, is that of the High Court of Calcutta An agreement, though made after breach, to accept what damages may be allowed by arbitrators appointed by the parties, is not within this section and it is binding on the parties (p)

Whether or not there is a novation of a contract is in each case a question of fact which this section does not in any way prejudge (q) Thus, in a suit (r) by the Government of Bengal against the defendant as surety for the treasurer of a collectorate on four surety bonds executed by the defendant, the Judicial Committee held that the mere fact that the collector examined the accounts at the end of each year and struck the balance which he certified to be correct and that on each occasion the defendant executed a new bond without, however, the old bonds being cancelled or given up did not constitute a novation of the old bonds so as to preclude the Government from suing the defendant on the old bonds on subsequent discovery of embezzlement of moneys by the treasurer during each year The following is a peculiar case A owes B Rs 330 A transfers the whole of this property by a registered instrument to C The consideration for the transfer is Rs 2 000 out of which C agrees to pay Rs 330 to B Here there is no novation for there is no contract between A B and C that B shall accept C as his debtor instead of A B is therefore entitled to recover the debt from A, though he may also be entitled to recover the amount from C under the registered document on the principle enunciated in the notes on s 2 that where a contract between

(m) *Manohar v. Thakur Das* (1899) 15 Cal 319

(n) *Pamiah v. Somas* (1915) 29 Mal J 125, 29 I C 419

(o) *V. M. Firm v. The Imperial Chetty* (1922) 47 Mal 185, 67 I C 100. In this case there was no evidence of breach.

(p) *Jam Nath v. Manohar Lal* (1913) 1 All 472, 33 I C 617. All I L J 173 All 334

(q) *Poushan Phee v. Hurray K. d. Nath* (1895) 8 Cal 906. The substance of the matter must be looked to if the form is equally consistent with a new agreement as with a mere recognition of a debt. *Kalyanath v. Lax v. Harnal* (1911) 14 Assn 121, 31 C W N 77, 19 I C 671. All I R 127 Cal 75.

(r) *Govt of Bengal v. The Government of Bengal* (1922) 9 D L R 364

A and C is intended to secure a benefit to B, B may sue to enforce it (s) An attempted novation which fails to produce a new enforceable contract may put an end to the original contract if it was the intention of the parties to rescind it in any event Such intention is a fact to be clearly proved (t)

**Alteration of Contract**—In English usage the term *novation* is confined to agreements which introduce a new party It is not applied to the substitution of a new agreement, or the variation of particular terms in a subsisting agreement, between the same parties Practically the most important questions arising in this last connection are questions of evidence and for this purpose the rules forbidding the admission of oral evidence to contradict or vary written agreements (u) have to be borne in mind It must, of course be shown especially where it is sought to prove a variation not by an express agreement but by a course of conduct that the variation was intended and understood by both parties (v) In the case of such an agreement to substitute a new contract, that which is substituted must be a contract capable of being enforced in law so that if by reason of any want of formality such as registration the document containing the contract is inadmissible in evidence the original contract will still be operative (u) In *Sirdar Kuar v Chandrawati* (x) accounts were stated between a creditor and his debtor and the latter passed the former a bond for the balance found due payable by instalments in which he hypothecated certain immovable property as collateral security The creditor received payment of three of the instalments under the bond and then brought a suit against the debtor for the balance of the debt basing his claim on the accounts stated It was held that the suit would not lie as by the execution of the bond the

(s) *Debnarayan Dutt v Chunilal Ghose* (1914) 41 Cal 137 141 144 20 I C 630

(t) *Morris v Baron* [1918] A C 1  
*British and Beningtons v V B Cachar Tea Co* [1923] A C 48 68 cp *Ganpat v Mahadeo* (1924) 85 I C 264 A I R 1925 Nag 26

(u) Laid down for British India in the Evidence Act s 92 as to the effect of subsequent variation on the right to specific performance, see Specific Relief Act, s 26 (e)

(v) See *Darnley v L C & D R Co* (1867) L R 2 H L at p 60 an incidental elementary dictum in a case decided on peculiar facts

(w) *Vundo Ashore Lall v Must Ramsoolhee Koor* (1879) 5 Cal 215  
*Paja Ram v Meher Khan* (1882) Punj Rec no 66  
*Udho Shah v Hira Shah* (1897) Punj Rec no 71  
*Abdul Kayam v Bahadur Luthola* (1911) 14 Bom L R 26

(x) (1889) 4 All 330

debt due on the accounts stated had come to an end. It appears from the report of this case that the bond was impounded by the revenue authorities, as it was insufficiently stamped, and this seems to be the reason for bringing the suit on the original debt instead of on the bond. This decision has been held (y) not to apply if the execution of the hypothecation bond is denied by the defendant and the bond remains on that ground unregistered. In such a case the plaintiff could not sue on the unregistered bond (z), and he would therefore be entitled to recover upon the account stated. "We cannot allow the defendant to take advantage of her own fraudulent conduct in preventing registration of the bond, and to say that in that bond was represented the contract which superseded that which is to be inferred from the statement of accounts" (y). Similarly where a mortgagee accepts a new security in lieu of the old, and the new security is held to be invalid by reason of a rule of Hindu law pleaded by the mortgagor, the mortgagor is entitled to fall back upon the old security. It would not be consistent with equity or good conscience that the mortgagor, having successfully maintained that the new security is invalid, should be allowed to claim the benefit of the transaction by which the new security was created as a release of the old security (a).

Where a contract for the sale of goods provides for delivery being given within a specified period, and the contract contains an arbitration clause, a mere extension of the time for giving delivery does not make it a new contract so as to put an end to the arbitration clause (b).

**Settlement contracts** — When a settlement contract is made, reselling the goods back again from the original buyer, the intention is not that after the settlement contract the first contract should be gone. The intention is that the two contracts should stand together. That being so, there can be a set off as regards delivery, and there can be a set off as regards price for everything except the difference. It seems to me to be abusing s. 62 of the Contract Act to say that after a settlement contract the original contract is utterly discharged" (c).

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(y) *Asam ul-din v. Jayson* (1898) 11 B. & L. C. 261. A. I. R. 1925 Nag. 20. All. 13.  
 (b) *Lachminarayan v. House Miller & Co* (1914) 41 Cal. 35, 21 I. C. 217.  
 (c) *Per Rankin J. in Union Carbide & Sulphur v. James Mann & Co* (1915) 40 Cal. 531, 112; 54 I. C. 285.  
 (a) *Har Chandra Lal v. Shree 1/2 Singh* (1917) L. J. 44 I. A. 60; 30 All. 178, 79 I. C. 313. (*per Anwar v. Mahabaleo* (1924)

**Transfer of actionable claims**—As to assignment of debts and actionable claims, see the Transfer of Property Act IV of 1882, Chap VIII.

**Promissory note on account of pre-existing debt.**—The cases referred to above must be distinguished from those where a person lends money or sells goods to another, and the debtor or buyer gives a promissory note for payment of the loan or price at a future time. In such cases the rule is that where a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a note to the creditor for payment of the money at a future time, the creditor, if the note is not paid at maturity, may sue for the original consideration, and if from any cause the bill or note is not admissible in evidence, this will not affect the original cause of action. But where the original cause of action is on the note itself, and there is no cause of action independent of it, as, for instance, when, in consideration of A depositing money with B, B contracts by a promissory note to repay it with interest at six months' date, there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if, for want of a proper stamp or some other reason, the note is not admissible in evidence, the creditor must lose his money (*d*).

**Excursus to S 62 : Unauthorised alteration of documents**—What if the document recording an agreement is altered without the consent of both parties? No answer to this question is given by the Contract Act, or anywhere in the Anglo Indian Codes, but Indian practice (notwithstanding a solitary reported opinion to the contrary) (*e*) follows the authorities of the Common Law. The rule is that any

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| <p>(<i>d</i>) <i>Sheikh Akbar v Sheikh Khan</i> (1881) 7 Cal 256, <i>Dargavarapu v Rampratap</i> (1902) 25 Mad 580, <i>Yarlagadda Veera Ragavayya v Goranla Ramayya</i> (1906) 29 Mad 111, <i>Rahmatulla v Ganesh Das</i> (1891) Punj Rec no 82, <i>Baldco v Mul Chand</i> (1904) Punj Rec no 7, <i>Pramatha Nath v Dwarkanath</i> (1896) 23 Cal 851, <i>Krishnaji v Fajmal</i> (1899) 24 Bom 360, <i>Sibramanian v Muthia</i></p> | <p>(1911) 35 Mad 639 at p 641, <i>Rahmat Ali Muhammad Faizi v Dewa Singh—Man Singh</i> (1923) 4 Lah 151, <i>Nathu Ram v Doyar Male</i> (1923) 4 Lah 193<br/>(<i>e</i>) <i>Fde v Kanto Nath Shaw</i> (1877) 3 Cal 220 where it seems to be supposed that s 37 of the Contract Act has abolished all defences to actions on contracts not expressly mentioned in the Act</p> |
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## THE INDIAN CONTRACT ACT

material alteration in an instrument made by a party, or by any one while it is in the party's custody or in that of his agent, disables him from relying on it either as plaintiff or as defendant (*f*), though he may sue for restitution under s 65 (*g*). In its earliest form it was connected with the old manner of pleading and producing deeds, but in modern times it was deliberately extended on grounds of policy. "A party who has the custody of an instrument made for his benefit is bound to preserve it in its original state" (*h*). The principle is said to be "founded on great good sense, because it tends to prevent the party in whose favour [an instrument] is made from attempting to make any alteration in it", and it is "as applicable to one kind of instrument as to another" (*i*). Any alteration is material which affects either the substance of a contract expressed in the document (*j*), or the identification of the document itself, at all events where identification may be important in the ordinary course of business (*k*). Alterations are immaterial if they merely express what was already implied in the document, or add particulars consistent with the document as it stands, though superfluous (*l*), or are innocent attempts to correct clerical errors (*m*). There may be cases of wilful fraud practised by a stranger where the rule will not be held to operate against the person who had the custody of the document (*n*). It may be that some degree of negligence on his part would in such a case have to be shown before he could be deprived of his rights.

(*f*) *Pattinson v Luckley* (1875) L R 10 Fx 330, *Suffell v Bank of England* (1882) 9 Q B Div 505, where authorities are collected, notes to *Master v Miller* in 1 Sm L C.

(*g*) *Anantha Rao v Surayya* (1920) 43 Mad 703, 53 I C 69.

(*h*) *Driscoll v Cooper* (1844) 13 M & W 343, 352, 67 R R 638, Fx Ch.

(*i*) *Grose J* in *Master v Miller* (1791) 4 T R 320, 345, 21 L J 131, 40 L J 1 C at p 795.

(*j*) The alteration need not be directly to the disadvantage of the party whose position is altered. See *Cadogan v Walsh* (1857) 5 L J 83, 13 L J 137.

(*k*) *Suffell v Bank of England* (1882) 9 Q B Div 505. A clerk of a bank

note with the number altered is not substantially the same note. It does not follow that in other kinds of documents commonly marked with consecutive numbers the numbers are material, but the fact that a person takes the trouble of altering a number shows that in his opinion at any rate it is material for some purpose.

(*l*) *Levy v Fox* (1887) 12 App Cas 209 where the document was a form of statement required by the Larceny Act then in force.

(*m*) *Hewitt and Osborne v Atter* [1892] 1 Q B 41.

(*n*) *Lee Lee Hooi v Lee* 12 App Cas at p 217.

**Indian decisions**—The Indian decisions on the subject may be divided into two classes. The first class comprises cases in which the suits were for bond debts brought upon the basis of altered documents. The second class relates to suits on documents which by the very execution thereof effect a transfer of interest in specific immovable property. As to the former class of cases, the Indian Courts have followed the principles of English law set out above, the point for decision in each case being whether the alteration was or was not material. Thus where a bond was passed to the plaintiff by one of three brothers, and the plaintiff forged the signature of the other two to the bond, and brought a suit upon it in its altered form against all the three brothers it was held that the alteration avoided the bond (o). In such a case the plaintiff is not entitled to a decree even against the real executant. Similarly, where the date of a bond was altered from 11th September to 25th September, it was held that the alteration was material as it extended the time within which the plaintiff was entitled to sue, it did not matter that the period of limitation, though reckoned from 11th September, had not expired at the date of the suit (p). On the same principle an alteration in a document which has the effect of enabling the payee to sue on the document in a Court in which he could not have sued on it in its original form is a material alteration and as such destroys the right of action on the document (q). Like wise, where the plaintiff altered a bill of exchange from D P, that is, documents to be delivered against payment, into D A, that is, documents to be delivered against acceptance, it was held that the drawer was not liable upon the altered bill (r). But the fact that the signature of an attesting witness had been affixed after execution to a bond that does not require to be attested is not a material alteration, and does not make the bond void (s). Nor is it a material alteration to add in a

(o) *Gogun Chunder Glose v Dhuronidhur* (1881) 7 Cal 616, *Gour Chandra Das v Prasanna Kumar Chandra* (1906) 33 Cal 812, *Karamala v Norain Sing* (1900) Punj Rec no 91.

(p) *Govindasami v Auppasami* (1889) 12 Mad 239.

(q) *Lakshammal v Narasimharaghava* (1915) 38 Mad 746, 21 I C 445.

(r) *Mesha Ahronel v The National*

*Bank of India Ltd* (1903) 5 Bom L R 524.

(s) *Kashi Nath Roy v Surbanand Shaha* (1885) 12 Cal 317, *Venkatesh v Baba* (1890) 15 Bom 44, *Ramayyar v Shanmugam* (1891) 15 Mad 70 dissenting from *Sitaram v Daya* (1883) 7 Bom 418, *Ramier v Shanmugam Pillai* (1892) 2 Mad L J 39, *Mangal Sen v Cannon* (1885) Punj Rec no 118.

document a description of immovable property which is not within the scope of the document (t) And where a seller of goods inserted in the document of sale a clause excepting a claim on a former account, it was held in a suit by him for the price of the goods that the alteration was not material so as to defeat his claim for the price (u) Besides the alteration being material, it must have been made in a document which is the foundation of the plaintiff's claim A material alteration, therefore, in a written acknowledgment of debt does not render it inoperative, as the acknowledgment is merely evidence of a pre-existing liability (v) In the last-mentioned cases, it is to be observed, the suit was not founded on the acknowledgment, but on the original loan, and the acknowledgment was relied on merely to save the plaintiff's claim from being barred, and the Court admitted it in evidence for that purpose But where a creditor bases his suit, not on the original loan, but on a bond passed by the defendant, and it is found at the hearing that the bond has been materially altered so as not to entitle him to a decree on the bond, the plaintiff will not be allowed to fall back upon the original consideration, and to rely on the altered bond as proof of acknowledgment (w) And the Madras High Court has held (x) that a purchaser for value of a piece of land from a person empowered to sell under a will is not precluded from relying upon the will to prove the validity of the sale, though forged attestations are added to the will after the sale The decision is obviously right, for the purchaser never had the custody of the will, nor is a will a document to which any one, properly speaking is party or privy, and his title was complete before the forged attestations were made An

(t) *Abdul Hossain v Goolam Hossain* (1906) 30 Bom 301 318

(u) *Gorindram Naidu v Kuppusami Pillai* (1893) 3 Mad L J 216

(v) *Umarum v Umelrum* (1901) 23 Bom 116 (where the date of the acknowledgment was altered), *Hareendra Lal Puri v Uma Chitra Ghosh* (1905) 9 C W N 605 (where an entry as to interest was interpolated in the acknowledgment), *Lal Saha v Mahomed Gossams* (1900) 5 C W N 26 where the suit was founded on the original loan, and the plaintiff relied on a promissory

note alleged to have been passed by the defendant as evidence of the loan It was found that the note was not genuine, but the plaintiff was allowed to prove the debt by other evidence, on the ground that, though the note was forged, the suit was not founded on the note This is a case of entire failure of a document distinguished from alteration of a document

(w) *Gur Chandra Das v Jaganmohun Chandra* (1887) 37 Cal 812 (where names of parties were altered)

(x) *Laxmamma v Uma Sankar* (1883) 7 Mad 50



document a description of immovable property which is not within the scope of the document (t) And where a seller of goods inserted in the document of sale a clause excepting a claim on a former account, it was held in a suit by him for the price of the goods that the alteration was not material so as to defeat his claim for the price (u) Besides the alteration being material, it must have been made in a document which is the foundation of the plaintiff's claim A material alteration therefore, in a written acknowledgment of debt does not render it inoperative, as the acknowledgment is merely evidence of a pre-existing liability (v) In the last mentioned cases, it is to be observed the suit was not founded on the acknowledgment, but on the original loan, and the acknowledgment was relied on merely to save the plaintiff's claim from being barred, and the Court admitted it in evidence for that purpose But where a creditor bases his suit, not on the original loan, but on a bond passed by the defendant, and it is found at the hearing that the bond has been materially altered so as not to entitle him to a decree on the bond, the plaintiff will not be allowed to fall back upon the original consideration and to rely on the altered bond as proof of acknowledgment (w) And the Madras High Court has held (x) that a purchaser for value of a piece of land from a person empowered to sell under a will is not precluded from relying upon the will to prove the validity of the sale, though forged attestations are added to the will after the sale The decision is obviously right, for the purchaser never had the custody of the will nor is a will a document to which any one properly speaking is party or privy, and his title was complete before the forged attestations were made An

(t) *Abdul Hossain v. Goolam Hossain* (1906) 30 Bom 304 318

(u) *Corindams Naidu v. Kuppasami Naidu* (1893) 3 Mal 11 J 200

(v) *Ittaram v. Umeharam* (1901) 20 Bom 616 (where the date of the acknowledgment was altered) *Harendra Lal Ray v. Uma Charan Chakrabarti* (1905) 9

W N C 3 (where an entry as to interest was interpolated in the acknowledgment) *Lal Sahai v. Mooni Jai Chandra* (1900) 5 C W N 26 (where the acknowledgment was inserted in the original bond) *At the first trial* relied on as a principle by

note all good to have been passed by the defendant as evidence of the loan It was found that the suit was not proved by other evidence or the ground that the plaintiff's title was forged the suit was set aside on the merits This is a case of entire failure of the plaintiff's title guided from a creation of a loan note

(w) *Chun Chandra Das v. Prabhakara Kumar Choudhary* (1900) 23 Cal 612 (where names of parties were altered)

(x) *Laxminarayana v. Laxminarayana* (1892) 17 Mal 100



In the earliest of these cases, known as *Ramasamy Kon's Case* (c), the plaintiff, who held a hypothecation bond from the defendant, altered the date of the bond so as to bring the personal remedy, which, according to the true date was barred within the period of limitation. The suit was to recover the balance of the bond debt from the defendant personally, and by sale of the hypothecated property. The Court passed a decree for the amount due against the *property*, holding that the altered document might be used as proof of the right created by or resulting from its having been executed. The exact frame of the plaint in this case is not stated in the report, and, according to later cases, the decision could only be upheld if the suit was not based on the altered document (d). In *Ganga Ram v Chandan Singh* (e), a case similar to the above, a hypothecation bond was fraudulently altered by the plaintiff so as to comprise a larger area of land than was actually hypothecated. The suit was brought on the altered bond, and the High Court of Allahabad held on appeal that the suit was rightly dismissed by the lower Court (f). In a subsequent Madras case (g) the plaintiff sued to recover the principal and interest due on a mortgage bond fraudulently altered by him by doubling the rate of interest and inserting a condition making the whole sum payable upon default of payment of any one instalment. The suit was brought on the altered bond, and the full Bench confirmed the decision of the Courts below, dismissing the plaintiff's entire claim. In *Subrahmanya v Krishna* (h), on the other hand, where also a mortgage bond was altered in a material respect, the suit was not based on the altered bond (i), and the Court allowed the bond to be used as proof of the

(c) (1866) 3 M H C 247. The judgment in this case was pronounced in two appeals relating to the same point. *Ramasamy Kon* and others who were plaintiffs in the original suit were appellants in both appeals.

(d) See *Christicharu v Kar'isaiyya* (1885) 9 M L J 399 410 411.

(e) (1881) 4 M L C 1.

(f) The Court held that the suit was not maintainable on the altered bond. The Court held that the suit was not maintainable on the altered bond. The Court held that the suit was not maintainable on the altered bond.

of land, which is against the principle set out in the text, and is held in subsequent cases to be against the weight of authority. See *Christicharu v Kar'isaiyya* (1887) 9 M L J 399 412 and *Mangil Sen v Shankar* (1903) 25 M L J 540.

(g) *Christicharu v Kar'isaiyya* (1887) 9 M L J 399.

(h) (1889) 23 M L J 137.

(i) 23 M L J p. 143. O'Connell J. held that the suit was not maintainable on the altered bond.

mortgagee's right to sell the property. In the last of the series of cases, decided by a full Bench of the Allahabad High Court (j), a puisne mortgagee brought a suit for sale against his mortgagors, and impleaded therein as a defendant a prior mortgagee, offering to redeem the prior mortgage. The prior mortgage, when tendered in evidence by the prior mortgagee, was found to have been tampered with, and altered in a material particular, the extent of the share mortgaged having been increased. Upon these facts it was held that such alteration did not render the instrument void *in toto*, so as to justify the Court in ignoring its existence and passing a decree in favour of the plaintiff for sale of the property comprised in it without payment of the amount due under it to the prior mortgagee. It will be seen that in this case there was no suit brought upon the altered document, nor was the prior mortgagee a plaintiff, but the decision of the majority of the full Bench did not rest upon these narrow grounds (k).

In both these classes of cases it has been held that where a suit is brought by a plaintiff on a document fraudulently altered by him he will not be allowed subsequently to amend the plaint so as to base his claim on the document as executed by the defendant (l). The Courts do not appear to have decided in these cases that the defendant is not liable in some form of proceeding to repay money which he has actually received (m).

In the case of negotiable instruments the English rule has been adopted to its full extent, as will be seen from ss 87—89 of the Negotiable Instruments Act XXVI of 1881 —

Sect 87. Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration, and does not consent thereto,

(j) *Mangal Sen v Shankar* (1903) 23 All 540.

(k) It has not been overlooked that Stanley C.J. in two places distinguished this case from *Gangaram v Chandan Singh* (1881) 4 All C2 *supra* stating

It is one thing for the Court to refuse its aid to a fraudulent plaintiff and another thing to direct the sale of property in which a defendant (prior mortgagee) has an interest without compensating him for such interest because

on production of his title-deed it is found to have been tampered with. See 23 All pp 540 601.

(l) *Gyan Chunder Ghose v Bihunadhar* (1881) 7 Cal 616, *Gangy Ram v Chandan Singh* (1881) 4 All 62, *Chandra Barla v Hari Dassappa* (1885) 9 Mad 379.

(m) See observations of Stanley C.J. in *Mangal Sen v Shankar* (1903) 23 All 540 at p 570.

In the earliest of these cases, known as *Ramasamy Kon's Case* (c), the plaintiff, who held a hypothecation bond from the defendants, altered the date of the bond so as to bring the personal remedy, which, according to the true date was barred, within the period of limitation. The suit was to recover the balance of the bond debt from the defendants personally, and by sale of the hypothecated property. The Court passed a decree for the amount due against the *property*, holding that the altered document might be used as proof of the right created by or resulting from its having been executed. The exact frame of the plaint in this case is not stated in the report, and, according to later cases, the decision could only be upheld if the suit was not based on the altered document (d). In *Ganga Ram v Chandan Singh* (e), a case similar to the above, a hypothecation bond was fraudulently altered by the plaintiff so as to comprise a larger area of land than was actually hypothecated. The suit was brought on the altered bond, and the High Court of Allahabad held on appeal that the suit was rightly dismissed by the lower Court (f). In a subsequent Madras case (g) the plaintiff sued to recover the principal and interest due on a mortgage bond fraudulently altered by him by doubling the rate of interest and inserting a condition making the whole sum payable upon default of payment of any one instalment. The suit was brought on the altered bond, and the full Bench confirmed the decision of the Courts below, dismissing the plaintiff's entire claim. In *Subrahmanya v Krishna* (h), on the other hand, where also a mortgage bond was altered in a material respect, the suit was not based on the altered bond (i), and the Court allowed the bond to be used as proof of the

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(d) See *Christachariu v Karibasiyya* (1885) 9 Mad 399, 410, 420.

(e) (1881) 4 All 62.

(f) Though the soundness of this decision has not been questioned, there is a passage in the judgment, 'The bond now produced by the plaintiff should be discarded as evidence of the hypothecation

of land,' which is against the principles set out in the text, and is held in subsequent cases to be against the weight of authority. See *Christachariu v Karibasiyya* (1885) 9 Mad 399, 412, and *Mangal Sen v Shankar* (1903) 23 All 580, 601.

(g) *Christachariu v Karibasiyya* (1885) 9 Mad 399.

(h) (1899) 23 Ma 1 137.

(i) 23 Mad p 143. O Farrell J held in a dissenting judgment that the suit was based upon the altered document p 149.

mortgagee's right to sell the property. In the last of the series of cases, decided by a full Bench of the Allahabad High Court (j), a puisne mortgagee brought a suit for sale against his mortgagors, and impleaded therein as a defendant a prior mortgagee, offering to redeem the prior mortgage. The prior mortgage, when tendered in evidence by the prior mortgagee, was found to have been tampered with, and altered in a material particular, the extent of the share mortgaged having been increased. Upon these facts it was held that such alteration did not render the instrument void *in toto*, so as to justify the Court in ignoring its existence and passing a decree in favour of the plaintiff for sale of the property comprised in it without payment of the amount due under it to the prior mortgagee. It will be seen that in this case there was no suit brought upon the altered document, nor was the prior mortgagee a plaintiff, but the decision of the majority of the full Bench did not rest upon these narrow grounds (k).

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In the case of negotiable instruments the English rule has been adopted to its full extent, as will be seen from ss 87—89 of the Negotiable Instruments Act XXVI of 1881 —

Sect 87 'Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration, and does not consent thereto,

(j) *Mangal Sen v Shankar* (1903) 25 All 580

(k) It has not been overlooked that Stanley C J in two places distinguishes this case from *Gangaram v Chandan Singh* (1881) 4 All 62, *supra*, stating, 'It is one thing for the Court to refuse its aid to a fraudulent plaintiff, and another thing to direct the sale of property in which a defendant (prior mortgagee) has an interest without compensating him for such interest, because

on production of his title deed it is found to have been tampered with.' See 25 All, pp 580, 601

(l) *Gogun Chunder Ghose v Dhuro nidhur* (1881) 7 Cal 616, *Ganga Ram v Chandan Singh* (1881) 4 All 62, *Christacharu v Karibasayya* (1885) 9 Mad 399

(m) See observations of Stanley C J. in *Mangal Sen v Shankar* (1903) 25 All 580, at p 599

unless it was made in order to carry out the common intention of the original parties, and any such alteration if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof. The provisions of this section are subject to those of ss 20, 49, 85, 125 "

Sect 88 "An acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement notwithstanding any previous alteration of the instrument "

Sect 89 "Where a promissory note, bill of exchange, or cheque, has been materially altered, but does not appear to have been so altered, or where a cheque is presented for payment which does not, at the time of presentation, appear to be crossed, or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon, and such payment shall not be questioned by reason of the instrument having been altered, or the cheque crossed " (n)

The framers of the Negotiable Instruments Act must have assumed that the English rule was applicable in India to other kinds of instruments, for it would be an absurd state of the law if such a rule applied to negotiable instruments alone

63 —Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit

Promisee may  
dispense with or  
remit performance  
of promise

#### Illustrations

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(c) A owes B ₹ 1000 rupees. C pays to B ₹ 1000 rupees on A's behalf.

(n) The English Bills of Exchange Act 1882 s 4 contains similar provisions. The holder in due course of a bill materially altered, the alteration not being apparent, can sue for payment of the

bill according to its original tenor whereas the Indian Act only protects persons paying him according to the apparent tenor.

## DISPENSATION FROM PERFORMANCE.

them, in satisfaction of his claim on A. This payment is a discharge of the whole claim (o)

(d) A. owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 rupees, and is also indebted to other creditors. A. makes an arrangement with his creditors, including B, to pay them a composition (p) of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

**Rule of the Common Law.**—This section makes a wide departure from the Common Law. In England, to quote an authoritative exposition, "it is competent for both parties to an executory contract by mutual agreement, without any satisfaction, to discharge the obligation of that contract", in other words, as reciprocal promises are a sufficient consideration for each other, so are reciprocal discharges. "But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment where the obligation is to be performed by payment", but, by the law merchant, the obligation of a negotiable instrument may be discharged by mere waiver (q). Subject to that exception, "the new agreement in rescission or alteration of a prior contract must in general satisfy all the requirements of an independent contract" (r), and so must an agreement to accept satisfaction for a right of action which has arisen by breach of a contract (s). And in particular, although the rule that the Court does not inquire into the adequacy of the consideration is applicable, and therefore anything different in kind from what is due may be a good satisfaction without regard to its apparent value, yet the Court cannot help knowing that nineteen pounds are not worth twenty pounds and accordingly, a less sum of money cannot be good satisfaction for a greater sum already due. This last rule was confirmed in our time with great reluctance by the House of Lords (t).

(o) See s. 41, p. 293, above.

(p) The word "composition" has been substituted for the word "compensation" by the repealing and amending Act (XII of 1891).

(q) *Foster v. Dwyer* (1851) 6 F. & S. 839, see per Parke B. at pp. 684-685. 80 R. R. 500, Bills of Exchange Act, 1882, s. 62.

(r) *Leake*, 591, 7th ed. See *King v. Gillett* (1840) 7 M. & W. 55. 56 R. R. 611.

The common form of pleading was that the plaintiff had discharged the defendant, but the plea could be supported only by proving an agreement.

(s) *Leake*, 659, 7th ed.

(t) *Faulstich v. Berr* (1884) 9 App. Cas. 605, notes to *Cumbe v. Hane* in 1 S. M. L. C. A negotiable instrument for the same or even a less sum will do, not, of course, because it is the equivalent of

But the English rules are not material in British India save so far as the knowledge of them may be useful to prevent misunderstanding and misapplication of English decisions founded on or involving them. The intention of the present section to alter the rule of the Common Law is clear, and has been recognised in several Indian cases (u)

**Scope of the section**—The present section and s. 62 must be construed so as not to overlap each other. This would be done by holding that agreements referred to in s. 62 are agreements which more or less affect the rights of both parties under the contract discharged by such agreements, whilst those referred to in s. 63 are such as affect the right of only one of the parties. The former case necessarily implies consideration, which may be either the mutual renunciation of right, or, in addition to this, the mutual undertaking of fresh obligations, or the renunciation of some right on the one side and the undertaking of some obligation on the other. It is only when the agreement to discharge affects the right of only one party that consideration might be found wanting, and there alone the Indian law departs from the English law by making provision for every such possible case in s. 63 (t)

**Remission of performance**—In 1903 the High Court of Bombay held (w) that a dispensation or remission under this section involves a promise as defined by s. 2 (b) or, what is the same thing, an agreement within s. 2 (c), so that 'there must be a proposal of the dispensation or remission, which is accepted' in technical terms, that the effect of the section is only to allow an accord to be good without satisfaction. The Judicial Committee has now overruled this opinion (against which the present writers have continuously protested) in few and decisive words. "The language of the section does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines." (x)

money, but, on the contrary, because it is not money. This is subject to the instrument being in fact given and accepted in full discharge and not merely as conditional payment of the amount due. *per Fletcher Moulton J. in Hira Chand v. Temple* [1911] = A. B. 330, 341.

(u) *Manohar Keshji v. Thakur Das Narsar* (1888) 15 Cal. 319, 321, *Das v. Chaudhary Mul* (1890) 19 Mas. 238.

40. *Naraji v. Kashi Sidel* (1890) 20 Bom. 636, 644.

(v) *Per Curiam Das v. Chaudhary Mul* (1890) 19 Mas. 308.

(w) *Uy. Narain v. Trimal Munshi* (1897) = 3 Bom. 61.

(x) *Chunni Mulani v. N. S. Mulani* (1915) 15 Cal. 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Thus the words of the section are construed according to their natural meaning and a promisee can discharge the promise not only without consideration but without a new agreement. We may now be excused for repeating part of our original protest though it is no longer necessary. There is nothing in the words of the section (we said) about promise, proposal, or acceptance, and we fail to see why any such matter should be imported, except on the assumption that the intention was to alter the English law of accord and satisfaction only by abrogating the requirement of consideration. But if consideration is no longer required, why should agreement be required? Let us now hope that Indian courts have at last shaken off the unfortunate and erroneous presumption that a codifying Act is to be read as saving every existing rule, however peculiar, which it does not repeal in literal terms.

Except so far as in the case of a corporation a dispensation from performance must satisfy the conditions required for its corporate acts in general, it does not seem that a formal obligation need be formally remitted.

Conceivable but not probable cases in which a promisor would be prejudiced by not being allowed to complete the performance of his promise, though he had received the consideration in full, may be left aside until they arise. It seems that, if they can be treated as exceptional, it must be by virtue of some special term implied in the particular contract.

Where a promisee remits a part of the debt, and gives a discharge for the whole debt on receiving the reduced amount, such discharge is valid, even though the remission was in pursuance of an oral agreement, which is inadmissible under s 92 (4) of the Evidence Act, 1872. Thus where a lessor, to whom rent is due under a registered lease, accepts a smaller amount of rent from the lessee in pursuance of a subsequent oral agreement to reduce the rent, and passes a receipt in full discharge of the rent due, the discharge will take effect indepen-

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High Court of Lahore, *folid Kalumal Derandas v Kessumal* (1928) 114 I C 97, A I R 1929 Sind 153. This appears to overrule the opinion (in any case difficult to understand) of the Rangoon High Court that if the

remission is in the form of an agreement it requires a new consideration. *Maung Pu v Maung Po Thant* (1928) 6 Rang 191, 110 I C 612, A I R 1928 Rang 144.

dently of the prior oral agreement, which certainly is not illegal, though it cannot be proved under the Evidence Act (y)

A dispensation or remission under this section may well be contingent on the happening of a future event, just as an original promise may. The holder of a promissory note from the officers of a masonic lodge agreed in writing to make no claim "if the . . . lodge building which has been burnt down is resuscitated." He cannot sue on his note after the lodge is rebuilt (z). It would be monstrous if he could.

Discharge from liability on negotiable instruments is specially dealt with in the Negotiable Instruments Act, 1881, ss 82, 90.

**Agreement to extend time.**—An agreement simply extending the time for performance of a contract is exempted by this section from any requirement of consideration to support it. No consideration is necessary to support such an agreement, exactly as none is required for the total or partial remission of performance (a). See, however, the commentary under the head "Remission of performance" (b). But an agreement by a mortgagee, about to exercise his power of sale, to postpone the sale for four days is not within this section; for it is not an extension of the time for performing the mortgagor's promise to pay the debt, which time is already past. Redemption, when the mortgagor is entitled to redeem, is not a performance of the original contract to pay the debt, and the exercise of the power of sale is not an exercise of a right of action on that contract (c). The time for performance of the contract must not be confounded with the time within which, notwithstanding default in performance, the mortgagor in default might still be allowed to redeem (d). These two decisions of the Bombay and Madras High Courts are quite consistent

(y) *Karampalli v Thellu Valli* (1902) 26 Mad 195. The cashing of a cheque offered in full satisfaction of a smaller amount does not of itself operate as a receipt or discharge in full. *Basko I am Sarup v Dilukh I am Sewak I am* (1922) 44 All 718, 68 I C 787, A I R 1922 All 401.

(z) *Abraham v The Lodge G. S. Hall* (1910) 34 Mad 156, where other notable points were also disposed of by the Court. The argument is not reported. Some unexplained formal irregularities

are not relevant here.

(a) *Datta v Cunnissami Nidali* (1896) 19 Mad 398, 402, *Jugal Kishore v Chari & Co* (1927) 49 All 593, 101 I C 613, 25 All L J 395, A I R 1927 All 451, *Maung Lu v Maung Po Thant* (1928) 6 Ran, 191, 110 I C 612, A I R 1928 Rang 141 *et seq*, is not law as reported.

(b) P 32 above.

(c) *Trimbal v P. J. Ramiah* (1888) 11 Bom 318.

(d) Ib p 324.

It need hardly be added that this section does not entitle a promisee to extend the time for performance of his own accord for his own purposes. Thus, where a date is fixed for delivery of goods under a contract and the seller fails to deliver the goods, the buyer may not of his own accord give further time to the seller for giving delivery, so as to claim damages on the footing of the rate on the later date fixed by him, he is entitled to damages on the basis only of the rate prevailing on the date fixed for performance in the contract (e)

64.—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Consequences of  
rescission of void  
able contract

Scope of the section —Contracts declared voidable (s 2, sub s 1) under this Act may be divided into two groups, namely, contracts voidable in their inception under ss 19 and 19A on the ground of fraud or the like, and contracts becoming voidable by subsequent default of one party, as mentioned in ss 39, 53, and 55

The use of the word 'voidable' is immaterial. Whenever one party to a contract has the option of annulling it, the contract is voidable, and when he makes use of that option the agreement becomes void. It has been suggested that the present section applies only to the first named class of contracts, which are voidable for want of free consent (f), but there is no apparent good reason for not including the others.

As to the applicability of this section to contracts rescinded under s 39, see the commentary on s 65 under the head 'When a contract becomes void' p 374, below.

The direct application of this section, according to recognised canons of interpretation, is only to contracts declared voidable by the

(e) *Muthaya v Lellu* (1914) 37 Mad 412, 413, 417, 14 I C. 235 expressly without giving a final opinion, *Nagesa Aiyar v. Apparu* (1915) 38 Mad

(f) *Brahmo Dutt v Dharma Das Ghose* 175 at p 183, per White C.J. 19 I C (1898) 26 Cal 301, per Maclean C.J., 462.

Act, but the principle which it affirms is one of general jurisprudence and equity, and applicable in various other cases. In *Sinaya Pillai v Munisami Ayyan* (g) a mortgage was executed by the guardian of a minor appointed under the Guardian and Wards Act without obtaining the sanction of the Court, as required by s 29 of the Act. Such a mortgage is voidable under s 30 of that Act. Here the High Court said that the mortgage could not be avoided on behalf of the minor, except on restoring to the mortgagee the benefit received by the minor's estate under the mortgage, and based its decision on the principle which, as the Court said, "is acknowledged in s 61 of the Indian Contract Act, in s 35 of the Transfer of Property Act, and generally by the Indian Courts as Courts of equity and good conscience." The same rule appears in ss 38 and 41 of the Specific Relief Act (h).

**Minor's contract**—It was settled that this section did not apply to a minor's contract, assuming that such contracts were only voidable. The term "person" in this section, it was said, does not comprise a minor, but means such a person as is referred to in s 11, namely, a person who (among other conditions) is of the age of majority according to the law to which he is subject. But, since the decision of the Judicial Committee that a minor is wholly incapable of contracting (i) there is no arguable question, and further authority is needless (j). Under that decision neither s 61 nor s 65 applies, and so there is no liability under them to make compensation (k). It does not follow, however, that a minor is entitled both to repudiate his agreement and to retain specific property which he has acquired under it, or to recover money after receiving for it value which cannot be restored. General principles of equity seem incompatible with such a result, and it would certainly be contrary to English authority (l). See

(g) (1898) 22 Mad 289, *Tejpal v Ganga* (1902) 25 All 69. See also *Autarji v Moti Haridas* (1878) 3 Bom 231.

(h) But this section does not empower the Court to impose a charge on property. *Tonnammal v Ickias Therasan* 99 I C 687, A I R (1927) Ma 1 204. 52 Mad L J 33.

(i) *Mohori Bhee v Dharmadas Ghose* (1903) 30 Cal 539, I P 30 I A 114. *Kamti Isaral v Sheo Copal Lal*

(1904) 26 All 312.

(j) See *Kampas Lal v Doba Ram* (1910) 8 All I J 1058, *Kamoti Ram v Kaura Khan* (1912) Punj Dec no 41 (loan to a lunatic).

(k) See also *Motilal Mansulthram v Manelilal Digvijayas* (1921) 45 Bom 227.

(l) See *Valentini v Canale* (1893) 4 Q B Div 166 and *ex Nottingham Building Society v Thorne* in (1903) A C 6810 and judgments of Lord I J as Lord Chancery in *C v A* (1871).

notes to s 11 under the head "minor's contract" and the cases there cited

**Election to rescind**—The broad principle on which this and the following section rest, and which, as we have seen, is not confined to cases expressly included in either of them was thus stated in England in one of the weightiest judgments of recent times—

"No man can at once treat the contract as avoided by him so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it" (m)

For the same reason a man cannot rescind a contract in part only. When he decides to repudiate it he must repudiate it altogether. If he has put it out of his power to restore the former state of things, either by acts of ownership or the like or by adopting and accepting dealings with the subject matter of the contract which alter its character, as the conversion of shares in a company or if he has allowed third persons to acquire rights under the contract for value (n), it is too late to rescind and the remedy, if any, must be of some other kind. 'You cannot both eat your cake and return your cake' (o)

It is hardly needful to say that rescission must be express and unequivocal. The clearest form of it is bringing a suit to set aside the contract. The will to rescind may also be declared by way of defence to an action brought on the contract—a declaration to that effect before action brought is not necessary as matter of law (p) though generally speaking the prudent course is to repudiate as soon as possible. See s 66, p 380 below

1 Ch at pp 10-13 *Steinberg v Scala* (Leeds) [1923] 2 Ch 450 C A. See *Dattaram v Vana-jak* (1903) 28 Bom 181. *Chinnaswami v Krishnaswami* (1918) 35 Mad L J 650. *Lambaj, Ravji v Rahu* (1920) 49 Bom 576 88 I C 643 A I R 1920 Bom 499 passage in text cited. This does not mean that money lent to a borrower whom the law declares absolutely incapable of contracting a loan can be recovered under cover of equitable compensation or under the present section. *Lambaj, Ravji v Rahu* *ibid*. See however s 41 of the Specific Relief Act as to the discretion of the

Court under that section which was exercised in the case now cited

(m) *Clough v L & A W R* (1871) L R 7 Ex 26-37 in Ex Ch. The judgment was Lord Blackburn's though not delivered by him. See 7 App Ca at p 360

(n) *Clarke v Dickson* (1858) E B & E 148 113 R R 583 decided on a state of company law long since obsolete and not very clear on the facts and dates but the rule in question is correctly laid down

(o) *Crompton J* E B & E at p 152

(p) See note (m)

By the Common Law lapse of time is not of itself a bar to setting aside a contract (subject to the risk of indefeasible rights having been acquired by third persons), but may be material as evidence of acquiescence, that is, of a tacit election to affirm the contract. But in British India, by the Limitation Act (g) a suit for the rescission of a contract must be dismissed, even though the defence of limitation is not set up unless brought within three years from the time when the facts entitling the plaintiff to have the contract rescinded first became known to him. English authorities on what amounts to acquiescence would seem therefore to have very little practical application.

**Benefit received "thereunder"**—The benefit to be restored under this section must be benefit received *under* the contract. A agrees to sell land to B for Rs 10 000. B pays to A Rs 4 000 as a deposit at the time of the contract the amount to be forfeited to A if B does not complete the sale within a specified period. B fails to complete the sale within the specified period nor is he ready and willing to complete the sale within a reasonable time after the expiry of that period. A is entitled to rescind the contract and to return the deposit. The deposit is not a benefit received *under* the contract: it is a security that the purchaser would fulfil his contract, and is *ancillary* to the contract for the sale of the land (i). Where a guardian sells his ward's property for purposes not binding on the ward and the sale price is utilised for the purchase of lands for the ward not contemplated at the time of the sale the lands so purchased for the ward do not constitute benefit received by the ward under the contract so as to entitle the vendee to have it conveyed to him on repudiation by the ward of the sale by the guardian (s).

**65**—When an agreement is discovered to be void (t), or

when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

(g) IN of 1892 s 3 and Section 114

(s) *Vises v. Lyster & Lyster* (1917) 38 Mad 178 131 C 40

(i) *Chandrasekhar v. Arundhanisami* (1918) 3 Mad 117 48 C 80

(t) *Lal Singh v. Jyoti* (1917) 38 Mad 178 131 C 40

*Illustrations*

(a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b) A contracts with B to deliver to him 250 maunds of rice before the 1st May. A delivers 130 maunds only before that day and none after. B retains the 130 maunds after the 1st May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance. [Z contracts with A to sell him land which in fact is already sold to B. A is entitled, notwithstanding a clause exempting Z from liability for defects in the title, to avoid the contract on the ground of fraud and recover his purchase money from Z under this section. *Akhtar Jahan Begum v Ha.ari Lal* (1927) 25 All L J 708, 103 I C 310, A I R 1927 All 693.]

**Duties of restitution.**—The matter corresponding to this and the last foregoing section, besides s. 39, is scattered about English books in the shape of technical rules and exceptions unintelligible, as usually stated, to any one who is not acquainted, not only with modern English law, but with the formulas of the ancient common law system of pleading which has long been obsolete in England, and survives only in some American jurisdictions. However, the substance of the question involved may be put thus:—“In what cases may an action be brought by a person who has entered into a special contract against the person with whom he has contracted, while his own side of the contract remains unperformed?” (a) And as in English law the plaintiff, if he recover at all, must do so either on the original contract or on some other implied contract, it has to be considered whether the special contract is subsisting but the defendant has dispensed the plaintiff from performing his part by making it impossible or otherwise, and, if it is not subsisting, whether a new contract by the defendant to pay for work done or other benefit which he has accepted, as the case may

so far as material, to have been the date of the agreement unless the Court is satisfied that it was later. *Shamshoo Lal v Dhankar Singh* (1927) 101 I C 265, A I R 1927 Oudh 177, *Gopal Hanuman v Pandurang* (1925) 92 I C 649, A I R 1926 Nag 241. But see also it is not rather a pure question of fact? (a) 2 Sm L C 10, 11th ed.

be, can be inferred. In the case where a party has contracted to do an entire work for a specific sum, he "can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusions that the parties have entered into a fresh contract" (v).

The illustrations to this section are rather miscellaneous. In (a) we have a simple case of money paid under a mistake (*cp s 72, p 401 below*). In (b) it does not seem that the contract has become void at all, but, on the contrary, that B has elected to affirm it in part, and dispense with the residue. There is no new contract under which he is bound to pay for the 130 maunds of rice as is shown by this that what he does accept he is undoubtedly bound to pay for at the contract price. In (c) it is not clear whether the contract is to be treated as divisible so that A is entitled to Rs 100 for each night on which she did sing, or the Court is to estimate what, on the whole, the partial performance was worth, nor would it be clear in England without fuller statement of the terms and circumstances. Illustration (d) is again simpler, English lawyers would refer it to the head of money paid on a consideration which fails.

**Scope of the section**—This section applies only to cases where an agreement is discovered to be void, or when a contract becomes void [see s 2, cl (j)]. It does not, therefore, apply to cases where there is a stipulation that, by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract. An insurance company is not, therefore, bound under the provisions of this section to refund to the heirs of the assured the premiums paid on the policy of life assurance where the assured had committed a breach of the warranty by making an untrue statement as to his age (u). This section does not apply to a case where one of the parties—such as a minor known at the time so to be (x)—being wholly incompetent to contract, there not only never was but there never could have been any contract (y).

(v) *Appleby v Myers* (1867) 1 P 2 (1867) 11 Q 1, judgment of the Ex Ch per Blackburn J.

(w) *Oriental Government Security Life Assurance Co Ltd v Narayana Chari* (1901) 25 Mad 163 214.

(x) It has been held that it applies where

the fact of minority was unknown to the parties at the time and discovered later. *Colley v Gulistan* (1927) 89 I C 147, A I P 112 Nov 108.

(y) *Maharaja v Dharmdas Ghose* (1903) 70 Cal 231 I I 20 I A 114.

*Melvil v Melvil & Melvil's Exors*

It does apply where a transaction not void but voidable is repudiated by the person entitled to do so, as in the case of a sale of Hindu joint family property by the father on behalf of himself and a minor son (c)

Where an agreement is discovered to be void —“The section deals with (a) agreements and (b) contracts. The distinction between them is apparent from s 2, by clause (e) every promise and every set of promises forming the consideration for each other is an agreement and by clause (h) an agreement enforceable by law is a contract. Sec 65 therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to be void. An agreement, therefore discovered to be void is one discovered to be not enforceable by law and, on the language of the section would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void (a). The expression ‘discovered to be void’ presents some difficulty as regards agreements which are void for unlawful consideration [ss 23 and 24]. On the one hand it has been said that the words “agreement discovered to be void” apply to all agreements which are void *ab initio* including agreements based upon an unlawful consideration (b). If this view be correct it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution and both the transferor and transferee are *in pari delicto*. It is difficult to suppose that such a result was contemplated by the Legislature. Moreover it would not be correct to say that where a person gives money for an unlawful purpose the agreement under which the payment is made can be on his part *discovered to be void*. On the other hand, it has been said that the present section does not apply where the object of the agreement was illegal *to the knowledge of both the parties* at the time it was made (c). If this view be correct a person who

*bhai* (1920) 45 Bom 295 59 I C 240  
*Punjabhai v Bhagwandas* (1908) 53 Bom  
 309 117 I C 518 A I R 1909 Bom 89  
 (z) *Lachmi Prasad v Lachmi Narain*  
 (1927) 25 All L J 96 107 I C 36  
 A I R 1928 All 41 but the case was  
 mainly governed by the Transfer of  
 Property Act

(a) *Harnath Kuar v Indar Bahadur*  
*Singh* (1903) L R 50 I A 69 75-76  
 40 All 179 71 I C 69 A I R 19  
 P C 403 Jud Comm per Sir L Jenkins  
 (b) *Jyishai v Nagji* (1900) 11 Bom  
 693 at pp 697 698 *Gulabchand v*  
*Fulbai* (1909) 33 Bom 411 at pp 416 41  
 (c) *Nall v Khan v Seetal Koori* (1911)

has paid money or transferred property to another for an unlawful purpose cannot recover it back even if the illegal purpose is not carried into execution and the transferor is not as guilty as the transferee. This is clearly against the provisions of s. 84 of the Indian Trusts Act 1882 (d). It seems on the whole that the present section does not apply to agreements which are void under s. 24 by reason of an unlawful consideration or object (e), and there being no other section in the Act under which money paid for an unlawful purpose may be recovered back, the analogy of English law will be the best guide. In fact, the English rule has actually been followed in a large number of cases in British India, and is reproduced as regards the transfer of property in s. 84 of the Trusts Act. According to that rule money paid in consideration of an executory contract or purpose which is illegal may be recovered back upon repudiation of the transaction as upon a failure of consideration. But if the illegal purpose or any material part of it has been performed, the money paid cannot be recovered back, for the parties are then equally in fault, and *in pari delicto melior est conditio possidentis* (f). It has thus been held that though an agreement for payment of money to the parent or guardian of a minor in consideration of his giving his son or daughter in marriage is void under ss. 23 and 24 as being against public policy, yet if the marriage

15 C W N 408 at p. 409. See also *Dayabhai Tribhorandas v. Lakhmi and Panachand* (1885) 9 Bom. 358 at p. 362 (case of a wagering contract under s. 30 of the Act) followed in *Changa Mal v. Sheo Prasad* (1920) 42 All. 449. 55 I. C. 965. It is not clear what the wide dictum in *Ahushai v. Labhan Rao* (1908) 110 I. C. 301, 306. A. I. R. 1928 Nag. 232 (authorities apparently not considered) was intended to include.

(d) That section runs as follows: "Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution or the transferor is not as guilty as the transferee or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law the transferee must hold the property for the benefit of the transferor."

See also *Prabhu Mal Gulab Mal v. Babu Ram Bakeshar Das* (1924) 89 I. C. 681. A. I. R. 1926 Lah. 159.

(e) See *Gulabchand v. Fulbas* (1909) 33 Bom. 411 at p. 417. *Amir Khan v. Saif Ali* (1893) Punjab Rec. no. 86. *Siblisor v. Manil Chaitra* (1915) 21 Cal. I. J. 618, 620. *Srinivasa Iyengar v. Setha Iyengar* (1918) 41 Mad. 107. 1909 41 I. C. 783. *Ledu v. Hirafal* (1916) 43 Cal. 115. 29 I. C. 5. See also *Dayabhai Tribhorandas v. Lakhmi Chandi Panachand* (1885) 9 Bom. 358, 362 and *Srikishore v. Chulabai* (1914) 31 Mad. I. J. 561. 41 I. C. 319. Both cases of agreements in way of wager under s. 30.

(f) *Taylor v. Lewis* (1876) 1 Q. B. D. 291. *Herrin v. Jeuchner* (1882) 1 Q. B. D. 561. *Acariya v. Thompson* (1888) 24 Q. B. D. 717. *Leikerpertal v. Mann* and others (1884) 33 I. A. 14 at p. 113.

is not performed, as where the son or daughter to be given in marriage died before the marriage could take place or the parent or guardian refuses to give the boy or girl in marriage, a party who has paid money under the agreement is entitled to recover it back (g) But if the marriage is performed, money paid under the agreement cannot be recovered back The same principle applies to cases where a person transfers his property *benami* to another in order to defraud his creditor In such cases, where the fraudulent purpose is not carried into execution, the transferee will be deemed to hold the property for the benefit of the transferor, as provided by s 84 of the Trusts Act Where, however, the fraudulent object is accomplished, the transferee will not be disturbed in his possession (h) The same rule applies where the unlawful object has been accomplished substantially, though not in its entirety (i) But it assumes that the act is *par delictum*, and it will not, therefore, apply where the transferor is not as guilty and is not to blame as much as the transferee (j) The same principles have been held to apply to payments made under agreements which are void under s 30 as being by way of wager (l) See notes on s 23 under the heads "Legislative enactments" "Immoral," "Stifling

(g) *Gulabchand v Fulbai* (1909) 33 Bom 411, *Fam Chand Sen v Audaito Sen* (1884) 10 Cal 1054, *Srinivasa Ayyar v Sesha Ayyar* (1918) 41 Mad 197, 41 I C 783, *Jivana v Malak Chand* (1919) P R 113

(h) *Petherpermal v Munsandi Serrai* (1908) L R 35 I A 98, *Chentirappa v Puttappa* (1887) 11 Bom 708 *Honappa v Narsappa* (1898) 23 Bom 406 *Pan gammal v Venkatachary* (1895) 18 Mad 378, *affd* (1896) 20 Mad 323 *Jaramati v Chundru* (1897) 20 Mad 326 *Kondeti Kama Poto v Nulamma* (1908) 31 Mad 485, *Papthavalu v Adinarayana* (1908) 32 Mad 323, *Gobardhan Singh v Piti Joy* (1896) 23 Cal 962 *Banika Bichary Dass v Paj Kumar Dass* (1899) 27 Cal 231, *Corinda Kwar v Lala Kishan Irowad* (1900) 28 Cal 370, *Jadu Nath Poddar v Puri Lal Poddar* (1906) 33 Cal 967 (the portion of the lead note stating that 11 Bom 708 and 20 Mad

326 have been dissented from is misleading see per Rampini J on p 969 and per Mookerjee J on p 983), *Mus sammat Poshun v Muhammad* (1887) Punj Rec no 46, *Pirtha Das v Hira Singh* (1898) Punj Rec no 63, *Gird harlal v Manilamma* (1914) 39 Bom 10 21 I C 50

(i) *Muthuraman Chetty v Krishna Pillai* (1906) 29 Mad 72

(j) See Trusts Act s 84 and Specific Relief Act s 35 (b) and illustration thereto See also *Sham Lal Mitra v Amarendra Nath Bose* (1895) 23 Cal 469

(l) *Darjibhai Tribhorandas v Lakshmanchand Panachand* (1885) 9 Bom 358, 362 *Srikakolapu v Gudiradi* (1918) 34 Mad L J 561 44 I C 319, *Devi Dal v Sunderdas* (1919) P I 65, *Vayappa Pilai v Arunachalam Chetty* (1924) 55 I C 1016 A I I 1925 Mad 251 (Court divided)

prosecution," "Marriage brocage contracts," and "Sale of public offices"

A transferee of property which from its very nature is inalienable is entitled to recover back his purchase money from the transferor, if the transfer is declared illegal and void (*m*) So also the purchaser of an expectancy (*n*) The time at which an agreement for the sale of an expectancy is "discovered to be void," so that a cause of action to recover the consideration arises under this section, in the absence of special circumstances, is the date of the agreement (*o*)

"When a contract becomes void"—The expression 'becomes void' includes cases of the kind contemplated by the second clause of s 56 [See notes on s 56 under the head "Refund," p 334 above, and the notes, p 379 below, under the head "Received any advantage"] It was deemed applicable by the High Court of Bombay (*p*) to the case of a lease which was terminated by the lessee under the provisions of the Transfer of Property Act on the destruction of the property by fire In that case the plaintiff hired a godown from the defendant for a period of twelve months and paid the whole rent to him in advance After about seven months the godown was destroyed by fire, and the plaintiff claimed a refund from the defendant of a proportionate amount of the rent, and subsequently brought a suit for the same The Court held that the provisions of s 108 (c) of the Transfer of Property Act applied to the case and that the plaintiff was entitled under this section to recover the rent for the unexpired part of the term The demand for a refund was treated by the Court as a notice to the defendant ending the lease (*q*) It was also stated in the judgment that the right to compensation under this section does not depend on the possibility of

(*m*) *Krishnan v Sankara Varma* (1886) 9 Mad 441, *Jyotsnabai v Nagji* (1909) 11 Bom L R 693, *Haribhai v Nathubhai* (1914) 38 Bom 219, 23 I C 602, *Javerbhai v Gordhan* (1915) 39 Bom 358, 29 I C 442, *Das Durah v Umedbhai* (1916) 40 Bom 614 36 I C 64 the last four being cases under the Bombay Bhagdadi Act V of 1862 The word 'illegal,' which is frequently applied to transfers of this character is not the proper word in such a case, the attempted transfer is a nullity

(*n*) *Harnath Kuar v Indar Pishadur Singh* (1923) 50 I A 69 45 All 179 71 I C 629 A I R 1922 I C 493 See also *Annala Mohan Poy v Gour Mohan Mullick* (1933) 50 I A 239, 50 Cal 929 74 I C 499 A I R 1923 I C 189

(*o*) (1923) 50 I A 239 50 Cal 929, 74 I C 499 last note

(*p*) *Dharamraj v Ahmedbhai* (1899) 23 Bom 15 followed in *Muhammad Hashim v Murti* (1922) 44 All 229, 67 I C 253

(*q*) See s 65 p 350 post

apportionment (r) Sec 108 of the Transfer of Property Act provides that, in the event of the property let being destroyed by fire, "the lease shall at the option of the lessee be void. A contract "becomes void" when a party disables himself from suing upon it by making an unauthorised alteration (s). The advantage is not recoverable unless it has been received before the contract becomes void (t).

**Contracts with corporations** —At common law the contracts of corporations must in general be under seal. To this however there are some exceptions. One of them is where the whole consideration has been executed and the corporation has accepted the executed consideration in which case the corporation is liable on an implied contract to pay for the work done provided that the work was necessary for carrying out the purposes for which the corporation exists (u). The exception is based on the injustice of allowing a corporation to take the benefit of work without paying for it (uu). This exception however is in certain cases excluded by statute. Contracts with a corporation are often required by the Act creating it to be executed in a particular form as, for instance under seal. The question in such cases is whether the Act is imperative and not subject to any implied exception when the consideration has been executed in favour of the corporation. If the Act is imperative and the contract is not under seal the fact that the consideration has been executed on either side does not entitle the party who has performed his part to sue the other on an implied contract for compensation. This may work hardship but the provision of the Act being imperative and not merely directory it must be complied with. The present section accordingly does not apply to cases where a person agrees to supply goods to or do some work for a municipal corporation and goods are supplied or the work done in pursuance of the contract but the contract is required by the Act under which the corporation is constituted to be executed in a particular form and it is not so executed. In such cases (v) the corporation cannot be charged at law upon the contract though the consideration

(r) Citing *Cunningham and Shephard's* notes to s 65

(s) *Anantha Rao v Surayya* (1900) 43 Mad 103 55 I C 697. *Hemchand v Gorind* (1904) 86 I C 185, A I R 1905 Nag 243

(t) *Wolf & Sons v Dadyba Khimji &*

*Co* (1900) 44 Bom 631 53 I C 460

(u) *Lawford v Billericay Rural District Council* [1903] 1 K. B 79

(uu) *Clarke v Cuckfield Union* (1852) 21 L J Q B 349 351 91 R R 891

(v) *Young & Co v Corporation of Royal Leamington Spa* (1883) 8 App Ca 517

has been executed for the benefit of the corporation. "The Legislature has made provisions for the protection of ratepayers, shareholders and others who must act through the agency of a representative body by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. . . . The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement" (*ve*). This decision has been followed by the High Courts of Allahabad (*w*) and Calcutta (*wc*). In the Allahabad case the plaintiff had supplied to the defendant municipality stone ballast for metalling the municipal roads in accordance with his tender, which had been accepted, but the contract was not in writing and signed as required by the Municipal Act (*x*). The plaintiff sued the municipality for the value of the materials supplied (*y*), and for damages for refusing to accept delivery of the rest of the ballast. He was held not entitled to recover; the contract, not having been committed to writing and signed as required by the Municipalities Act, could not form the basis of any suit against the municipality, notwithstanding that ballast was supplied in pursuance of it. It was also held that the section did not apply, as the case was not one where the agreement was "discovered to be void," or had "become void," within the meaning of the section. This decision is in obvious conflict with a prior decision of the High Court of Bombay already cited and considered on another point (*z*). The Bombay case was the converse of the Allahabad case, the plaintiff being the municipality and the other party to the contract the

(*ve*) *Ibid*, per Lord Bramwell, at p. 528. The "wafer" is the common modern substitute for a waxen seal.

(*w*) *Radha Krishna Das v. Municipal Board of Benares* (1905) 27 All. 592.

(*wc*) *Mathura Mohan Saha v. Ram Kumar Saha* (1916) 43 Cal. 790, 814 *eqq.*; 35 I. C. 305; *Mohamad Ibrahim Molla v. Commissioners for the Port of Chittagong* (1926) 54 Cal. 189, 210 *eqq.*; 103 I. C. 2; A. I. R. 1927 Cal. 465.

(*z*) N. W. P. and Oudh Municipalities Act XV of 1883, s. 49, and Local Act No. 1 of 1900, s. 47.

(*y*) The municipality had in this case paid the plaintiff for a part of the ballast supplied to them, and as to another part supplied to them they deposited Rs. 1,094 in Court, as the plaintiff claimed more. The rest of the ballast was not accepted as being of inferior quality.

(*z*) *Abaji Sadaram v. Tribunal Municipality* (1903) 28 Bom. 64, see p. 362, above. Also, it seems, with *Lachner Municipal Board v. Delhi Dist* (1926) 1 Luck. 444; 90 I. C. 647; A. I. R. 1926 Oudh 388, but the report is confused.

defendant In that case the Municipality of Trimbak granted to the defendant the right of levying and collecting certain tolls for a period of fourteen months for which the defendant agreed to pay to the municipality Rs 15 001 The contract was required by the Bombay District Municipal Act (a) to be sealed with the seal of the municipality, but it was not so sealed The defendant levied and collected the tolls and paid part of the agreed amount, but failed to pay the balance, for which the municipality sued him The defence was (1) that the municipality had dispensed with payment of the balance, (2) that the contract, not being under seal, was unlawful within the meaning of s 23 as if enforced it would defeat the provisions of the Act, and that it could not therefore be enforced against the defendant, though the consideration had been executed for his benefit The defence failed on the first point as we have seen above on s 63, and on the second point on the ground thus stated in the judgment "It is a well recognised law in England that though a contract by a corporation must ordinarily be under seal still where there is that which is known as an executed consideration an action will lie though this formality has not been observed Notwithstanding s 23 of the Indian Contract Act we see no reason for not adopting the same view of the law here For we think when regard is had to the principle on which the English Courts have proceeded it is clear we do not run contrary to any provision of s 23 of the Contract Act in holding that in this country too as in England where there is an executed consideration a suit will lie even in the absence of a sealed contract But as the Allahabad High Court said in *Radha Krishna Das's Case* (b) According to the ruling of the House of Lords to which we have referred an action will not lie in England against a corporation which is governed by an Act such as the Public Health Act of 1875 in the absence of a sealed contract even though there is an executed consideration The reference to s 23 of the Contract Act seems to be irrelevant If the plaintiff was disabled from suing it was by the Bombay District Municipal Act and the real question was whether that Act was imperative and not subject to any implied exception in a case where the consideration had been executed in favour of the municipality As the municipality cannot be sued upon a contract which is required to be, but which is not under seal though the consideration has been exe-

(a) Bombay Act II of 1864 s 30

(b) (1881) 27 All at p 660

cuted for its benefit, so it cannot sue upon the contract, though it has performed its own part of the contract so that the other party has had the benefit of it (bb) In *Mohamad Ebiagim Molla v Commissioners for the Port of Chittagong* (c) the Commissioners for the Port of Chittagong sued the defendant for the recovery of money due as hire of a tug lent to the defendant under a contract with him. The contract was not under seal as required by s. 29 of the Chittagong Port Act 1914. It was held that the Act was imperative in its terms and that the plaintiffs could not sue on the contract. It was held at the same time that the plaintiffs were entitled to payment upon a *quantum meruit*. Two of the English cases cited (cc) lay down that where the provision of a statute as to the form of a contract is not imperative—but there only—either party may sue the other on an implied contract to pay for work done. It appears from the report of this case that counsel for the defendant (who was the appellant before the Court) himself conceded that the plaintiffs were entitled (though not in that suit) to some compensation for the use of the tug. It is submitted that both counsel and the Court were in error in thinking that the plaintiffs were entitled to recover *quantum meruit*. No question of payment upon a *quantum meruit* can arise where an Act is imperative.

At all events, where a contract which fails to comply with the statutory formalities is only executory, neither party can enforce performance against the other (d).

“Any person”—The obligation under this section to restore the advantage received under an agreement is not confined to parties to the agreement, but extends to any person that may have received the advantage (dd).

**Limitation**—Where an agreement is discovered to be void the period of limitation for a suit for a restoration of the “advantage”

(bb) *Paman Chetty v Municipal Commission of Kumbakonam* (1907) 30 Mad 230. *South Barrackpore Municipal Corp (Chairman et al) v Amulya Nath Chatterjee* (1907) 34 Cal 1070. 35 I C 303. *Mohamad Ebiagim Molla v Commissioners for the Port of Chittagong* (1926) 54 Cal 189. 210 et seq. 103 I C 2, A I R 1—Cal 465.

(c) (1927) 54 Cal 189. 103 I C 2;

A I R 1927 Cal 46.

(cc) *Laforet v Hillier et al Justices of the Peace and Council* [1903] 1 K B 773. *Dunlop v John Urban District Council* [1917]—Ct 407.

(d) *Ahmed Bad Munimally v Sulemanji* (1903) 24 Bom 619.

(dd) *Craig v Hill et al* & *Harvey et al* (1889) 9 All 340. 317.

under this section runs from the date of such discovery. It was so laid down by the Privy Council in *Bassu Kuar v. Dhum Singh* (c). In that case A agreed to sell his land to B in consideration of a debt due by him to B on accounts stated. B having declined to complete the purchase A brought a suit for specific performance in which it was held that the agreement was unenforceable. B then sued A to recover the amount due to him. If the suit was regarded as one falling within article 64 of the Limitation Act for money due on accounts stated it was barred by limitation under that article. On the other hand, if the suit was one for money paid upon an existing consideration which afterwards failed it was within the period of limitation as it was brought within three years from the date of the failure of consideration. The Privy Council took the latter view stating that the agreement for the purchasing of land was *discovered to be void* when it was decreed to be ineffectual in the suit for specific performance and that the consideration therefore failed when the decree was made which imposed an obligation upon A under this section to return the consideration money retained by him and conferred a corresponding right on B to recover the amount within three years from the date of the decree.

“Received any advantage”—This it is submitted does not include a case where a plaintiff has abandoned an entire contract and left unfinished work—buildings on the defendant's land for instance—in such circumstances that the defendant cannot help keeping it for here in English law there is nothing to show a fresh contract to pay the actual value of what has been done as there would be if the defendant had kept goods which he might have returned (f) and no reason appears why the same principle should not hold in India.

In England where a contract becomes impossible of performance by the destruction of the subject-matter or the failure of an event or state of things contemplated as the foundation of the contract to happen or exist (see on s. 56 above) the rule is that the parties are excused from further performance and acquire no rights of action so that each must bear any loss or expense already incurred and cannot recover

(c) (1888) 11 All. 47 L. R. 15 I. 157 is a similar case

A. 211 followed in *Udit Narain v. Muhammad* (1903) 25 All. 618 *Hingam Lal v. Mansa Ram* (1894) All. W. N. (f) *Sumpter v. Hedges* [1898] 1 Q. B. 63 C. A.

back any payment in advance (g) The present section appears to include such cases so far as they fall within s 56, and not to lay down any special rule with regard to them It would seem, therefore that the general rule of this section applies to such cases and that, contrary to the English decisions, each party is bound to return any payment received Justice, it is submitted, could be most nearly done by treating such payments as returnable, but allowing to either party compensation for anything reasonably done by him towards performance whether the other party actually derived any advantage from it or not, but neither the English nor the Indian rule will yield this result unless indeed the Indian Courts are prepared to take the bold step of applying s 70 to acts done, at the time under a subsisting express contract

# 66.—The rescission of a voidable contract may be com-

Mode of communicating or revoking rescission of voidable contract

municated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal

# 67.—If any promisee neglects or refuses to afford the

Effect of neglect of promisee to afford promisor reasonable facilities for performance

promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non performance caused thereby

## Illustration

A contracts with B to repair B's house

B neglects or refuses to point out to A the places in which his house requires repair

A is excused for the non performance of the contract if it is caused by such neglect or refusal

**Refusal or neglect of promisee**—The illustration is apparently founded on *Malin v Watkinson* decided by the Court of Exchequer in 1870 (h) There the question was in effect whether a covenant by the lessor of a building with the lessee to repair the main walls, main timbers and roofs was to be taken as absolute, or as implying that

(j) *Appleby v Myers* (1867) 1 R 2 C 1 C 1 Civil Serv of C operated Socy v General Steam Navigation Co (1872) 2 L R 2 C 1 A subject to any

express agreement *Field v Gentles* (1906) 1 C 1 (A) 1 R 61 x 23

the lessor was entitled to have notice from the lessee of any want of repair. The majority of the Court held that it must be read as a covenant to repair on notice, as the lessor had no sufficient and reasonable means of ascertaining for himself what repairs were necessary. Perhaps a case more exactly in point is that of an apprentice, whom a master workman has undertaken to teach his trade, refusing to let the master teach him. "It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught" (i). Conversely, if a master undertakes to teach several trades, and gives up one of them, the apprentice need not stay with him. "If the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve" (j).

## CHAPTER V.

### OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

68.—If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person (k).

Claim for necessities supplied to person incapable of contracting, or on his account

#### Illustrations

(a) A supplies B a lunatic with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B a lunatic with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

**Minors**—Since the decision of the Judicial Committee in *Mohori Bibi v. Dhurmodas Ghose* (l) it is clear that this section applies to

(i) *Paymond v. Vinton* (1866) L. R. 1 Ex. 244

(j) *Ellen v. Topp* (1851) 6 Ex. 424, 442, 86 R. R. 353. The use of the word "stipulated" is incorrect. A man stipulates for what he is to be entitled to, not for what he is to perform. The term is proper to Roman law, and is better

avoided in our system.

(k) The application of this section is not excluded by the Punjab Court of Wards Act. *Umrao Singh v. Banarsi Das-dip Chand* (1927) 101 I. C. 702, A. I. R. 1927 Lah. 414.

(l) (1903) 30 Cal. 503, L. R. 30 I. A. 114.

1. minors as well as to persons of unsound mind (see the illustrations) and others, if any, disqualified from contracting by any law to which they are subject. It is therefore needless to consider the doubts expressed in earlier Indian cases.

“Necessaries.”—Costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy are “necessaries” within the meaning of this section (m). And so are costs incurred in defending him in a prosecution for dacoity (n). So also is a loan to a minor to save his property from sale in execution of a decree (o). Money advanced to a Hindu minor to meet his marriage expenses is supplied for “necessaries,” and may be recovered out of his property (p). Similarly, money advanced to the manager of a joint Hindu family, who was a minor at the date of the loan, for the marriage of his sister, is recoverable from the joint family property. This decision rests on the duty imposed by Hindu law on the manager of a joint family to provide for the marriage expenses of the female members of the family (q).

As to the definition of necessaries in general, see notes to section 11, under the head “Necessaries,” p 77, above.

Reimbursement  
of person paying  
money due by  
another, in pay-  
ment of which he  
is interested

69.—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other (r).

(m) *Watkins v. Dhunnoo Baboo* (1881) 7 Cal 140. In this case the suit was brought by an attorney appointed by the guardian *ad litem* of the minor to recover his costs from the minor. The attorney was engaged by the guardian, and no question was raised whether under the circumstances the suit would lie against the minor. In *Branson v. Appanna* (1891) 17 Mad 257, it was held under similar circumstances that the suit would not lie. See also *Lenkata v. Timmajji* (1898) 22 Nil 311. In *Isakram v. Ayb Khan* (1901) 4 All 52, 18 I C 657, A I R 1927 All 2, the Court again followed the Calcutta rule with solemnly aware that (n) *Salem Chandra Mul v. Chandra*

*Debya Singh* (1891) 21 Cal 872. See also *Sunlarajy Gyangar v. Pallana thusami Terar* (1891) 17 Mad 306.

(o) *Kudar Nath v. Ajudhia* (1893) Punj Rec no 185. See also *Atmaram v. Hunar* (1888) Punj Rec no 96.

(p) *Fathal Kuli Charan v. Jam Dens Rim* (1917) 2 Pat L J 627, 42 I C 903, and not the less because it is part of a larger and otherwise inalienable loan *Yal Rao v. Chaulfais* (1927) 101 I C 231 A I R 1927 Nag 196, cp *First Jeeva Loan Co., Ltd v. Capital Home Finance Co. Ltd* (1927) 3 C W N 308, 94 I C 163, A I R 1923 Cal 657.

(q) *Sardar Jood v. Ayub Jood* (1910) 7 All 325.

(r) On the other hand a plaintiff's claim under

*Illustration*

B holds land in Bengal, on a lease granted by A, the zamindar. The revenue payable by A. to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B. to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid (s). [As to the date from which time runs for the purpose of limitation in cases within this section, see *Muthuswami Karundan v. Ponnayya Karundan* (1928) 110 I. C 613, 51 Mad 815; A. I. R. 1928 Mad. 820.]

**English law.**—This section lays down in one respect a wider rule than appears to be supported by any English authority. The words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience, or at any rate of any detriment capable of being assessed in money (t). This is not enough, in the Common Law, to found a claim to reimbursement by the person interested if he makes the payment himself. Authoritative statements in English books are much more guarded, for example: "If A. is compellable to pay B. damages which C. is also compellable to pay B, then A., having been compelled to pay B, can maintain an action against C. for money so paid, for the circumstances raise an implied request by C to A to make such payment in his case. In other words, A can call upon C. to indemnify him" (u).

It will be observed that the obligation had to be stated as a fictitious contract in order to find a place for it within the rules of common law pleading. The meaning is that C, who did not in fact ask A

this section fails if the Court concludes that he was really the person bound to pay. *Muhammad Habib ul Rahman v Sheonandan Singh* (1928) 111 I C 243, A I R 1928 Pat 552

(s) *Fayazunissa v. Bajrang Bahadur Singh* (1927) 104 I C 358; A. I. R. 1927 Oudh 609, is almost identical with this

(t) The view propounded in the text was adopted by Stanley C.J. in *Tulsa Kunwar v. Jageshwar Prasad* (1906) 28 All 563, by the Madras High Court in *Subramania Iyer v. Rungappa* (1909) 33 Mad 232 and by the Calcutta High Court in *Panjabati v. Anani Lal* (1914)

18 C W N 778, 781 21 I C 207, *Eastern Mortgage & Co v Muhammad Fazlul Karim* (1925) 52 Cal 914, 90 I C 851, A I R 1926 Cal 385 see also *Sattya Bhusan v. Krishna* (1914) 18 C W N. 1308, 1310-1311, 24 I C 259, *Agendra Nath Roy v. Jugul Kishore Roy* (1925) 29 C W N 1052, 1055, 90 I C 281, A I. R. 1925 Cal 1097, *Siti Fakir v. Chand Bewa* (1928) 32 C W N. 1087, 108 I. C 46; A I R 1928 Cal 389, *Muthurallu v. Rakkappa* (1914) 26 Mad L J 66, 70-71, 22 I C 9

(u) *Bonner v. Tottenham, etc., Building Society* [1893] 1 Q B 161, 167, per A. L. Smith L J

to pay, is treated as if he had done so. In jurisdictions where the old rules of pleading have been abrogated, or were never in force, the fiction is superfluous, and the duty may be expressed, *as in this section*, in plain and direct terms without any talk of an implied request (v). The late Mr. Leake did this in language which has been made authoritative by high judicial approval —

“Where the plaintiff has been compelled by law to pay, or, being compelled by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount” (w).

Such a right to indemnity arises where one man's goods are lawfully seized for another's debt, *e.g.*, as being liable to distress, and are redeemed by the owner, the owner will be entitled to indemnity from the debtor, though he may have exposed his goods to the risk of distress by a voluntary act not done at the debtor's request or for his benefit (x).

But the English authorities do not cover a case where the plaintiff has made a payment operating for the defendant's benefit, but was not under any direct legal duty to do so, nor where the defendant was not bound to pay though the payment was to his advantage. The assignee of a term of years mortgaged the premises by sub lease. The mortgagees took possession but did not pay the rent due under the principal lease. The original lessees, who of course remained liable to the lessors, had to pay the rent, and sued the mortgagees to recover indemnity. It was held that the action did not lie (y), for there was no obligation common to the plaintiff and the defendant. It was to the mortgagees'

(v) I fail to understand Makenzie's dictum in *Eastern Mortgage Co v. Muhammad Faizul Karim* (1925) 52 Cal 911, 928, 90 I C 85, A I R 1926 Cal 385 a case complicated by bad pleading and a groundless charge of fraud.

(w) Adopted by Cockburn C.J. in the Ex Ch., *Moule v. Garrett* (1872) 1 R 711, 101, 104 and Vaughan Williams J.J. in *Tanner's Case* (n (u)) [1885] 1 Q B at p. 173. The learned author's words are altered in recent editions of

Leake on Contracts (p. 477th ed.) but the sense is unaffected.

(x) *F.I. Units v. Wallingford* (1881) 11 Q B Div 511 disapproved in *England v. Marston* (1896) 1 R 1 C 1 222. The simpler case of a decreed filer who has attached property of the debtors and pays to save it from sale in distress proceedings is covered by the same principle. *Chun Lal v. Man Lal Chandel* (1916) 97 I C 319, A I R 19 111 747.

(y) *Tanner's Case* (1885) 1 Q B 101, 107.

interest that the rent should be paid, but no one could call on them to pay it. This case, it would seem, would be decided in the same way under the present section. The words "bound by law to pay," as they fix the limit of the law in India, mark the point beyond which the Court of Appeal refused to extend it in England. The case of a second or later mortgagee paying off a prior mortgage to avoid a sale is different. He has his remedy under this section, and the special rights conferred on him by s 71 of the Transfer of Property Act do not exclude that remedy (c).

"Person . . . interested in the payment of money."—This section only applies to payments made *bona fide* for the protection of one's own interest. A person may be interested in the payment, but if in making the payment he is not actuated by the motive of protecting his own interest, he cannot recover under this section (a). Thus where A purchases property from B, but the sale is fictitious, A cannot recover from B money paid by him to save the property from being sold in execution of a decree against B (b). It is otherwise, however, if the sale is *bona fide* (c). A putnidar who makes payments on account of Government revenue due by his superior landlord who had failed to pay the same is entitled to recover under this section, even though the risk to his putni may be remote, provided he had *some* interest in making the payment (d). Payment made by the darputnidar of a share of a putni of the whole rent due on the putni to save it from being sold in execu-

(z) *Durga Charan Chandra v Ambica Charan Chandra* (1927) 54 Cal 424 101 I C 130 A I R 19-7 Cal 393

(a) See *Desai Himatsingji v Bharabhai* (1880) 4 Bom 643 652. A railway executive engineer has no interest in the payment of freight on goods under a contract made in his name on behalf of the Railway Administration: his proper remedy was to refuse delivery. *Secy of State v Rangaswami & Co* (1927) 106 I C 657 (1927) Mad W N 872

(b) *Janki Prasad Singh v Baldeo Prasad* (1908) 30 All 167

(c) *Subramania Iyer v Rungappa* (1909) 33 Mal 232

(d) *Smith v Dinonath* (1885) 12 Cal 213, *Bama Sundari Das v Adhar*

*Chunder* (1894) 22 Cal 28. And see *Nath Prasad v Baij Nath* (1880) 3 All 66 and *Krishna Kamini Choudhrani v Gopi Mohun* (1888) 15 Cal 652 (where the point actually decided was that cases falling within ss 69 and 70 are cognisable by a Court of Small Causes in the Mufassal). *Op Ajudhia Prasad v Bahar Sayad* (1883) 5 All 400, cited in the commentary on s 70. Much more is the mortgagee of a share in a *mahal* purchasing it at a sale under a decree obtained by him a person interested in the payment of arrears of revenue on the whole, all the co sharers being jointly and severally responsible therefore under the Land Revenue Act. *Ram Rattan v Gaura* (1930) 192 I C 765

tion of a decree obtained by the landlord in a suit for arrears of rent comes within this section, though the suit was brought against some only and not all of the putndars (e) Similarly, where A's goods are wrongfully attached in order to realise arrears of Government revenue due by B, and A pays the amount to save the goods from sale, he is entitled to recover the amount from B (f) A Hindu reversioner is interested in the payment of arrears of Government revenue which a Hindu widow is bound to pay in respect of property in which she has a widow's estate, and he is entitled to recover the same from the widow (g) So also is he interested in making a deposit under Order XXI, rule 89, of the Code of Civil Procedure, to have a sale in execution of a decree against a Hindu widow set aside, the sale being of the entire interest in the property sold and not merely the widow's interest (h) A Hindu mother who has incurred expenses for her daughter's marriage is entitled to recover the expenses from her husband's coparceners. The liability of the coparceners is clearly one which arises under the Hindu law, but it has been said, though not without some difference of opinion, that it also arises under this section (i) Where A makes a gift of a portion of land to B himself undertaking to pay the *judi* in respect of it, and then makes a gift of the rest of the land to C subject to the condition that C shall pay the *judi* in respect of the whole land, B is entitled on failure of C to pay the *judi* to make the payment and to recover it from C (j)

It is enough for a person claiming under the provisions of this section to show that he had an interest in paying the money claimed by him at the time of payment. Thus money paid by a person while

(e) *Rajani Kanta v Hays Lal* (1917) 21 C W N 628 41 I C 242

(f) *Tulsa Kunwar v Jageshwar Prasad* (1906) 23 All 563 *Khushal Singh v Khawani* (1906) All W N 282, *Abid Hussain v Ganga Sahai* (1908) 113 I C 411 26 All I J 435 A Y J 118 All 33 The decision in *Chandra v Kundan Lal* (1882) All W N 149 150 where it was held that a vendor who had paid under compulsion arrears of revenue payable by the purchaser was not entitled to recover from the purchaser cannot now be supported but as regards the

decisions in the above cases Cp note (x) last page

(g) *Sambasiva v Seethalakshmi* (1909) 10 Mal I J 331

(h) *Lunthabati v Vani Lal* (1914) 18 C W N 778

(i) *Chakuntam v Kalliparam* (1900) 21 Mal 512 (1902) 20 Mal 417 *Ichai Jangannaimmal v Ichai Jannanji* (1911) 3 Mal 114 "3"

(j) *Somaiah v Sumanji* (1915) 42 B m 93; 47 I L 48 *Chand Joo v Sumanji* (1915) 34 Mal 276 "3" 213 I 11

in possession of an estate under a decree of a Court to prevent the sale of the estate for arrears of Government revenue may be recovered by him under this section even though the decree may be subsequently reversed and he may be deprived of possession (k) In the case now cited the Judicial Committee said —“It seems to their lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payment for the preservation of the estate in dispute and the estate is afterwards adjudged to his opponent he should be recouped what he has so paid by the person who ultimately benefits by the payment if he has failed through no fault of his to reimburse himself out of the rents” (l) Conversely, payment of kist made by a person who had obtained a decree for possession of certain lands may be recovered back by him though the payment may have been made when he was not yet put into possession pending an appeal and a second appeal (m) Similarly moneys paid by a mortgagee of a putni tenure to save the tenure from sale for arrears of rent pending *bona fide* litigation between him and his mortgagor relating to the amount of the mortgage debt may be recovered back under the provisions of this section even though it may be eventually found by the Court that the whole of the mortgage debt was as a matter of fact satisfied before the date of payment (n) In a later case (o) the plaintiff purchased a putni taluk at a sale held under Regulation VIII of 1819 at the instance of the zamindar for non payment of rent by putnidars The sale was set aside in May 1894 in a suit brought by the putnidars for the purpose against the zamindar and the plaintiff The zamindar alone appealed against the decision and pending the appeal the zamindar called upon the plaintiff to pay rent that had accrued from April 1894 to November 1894 The plaintiff thereupon paid the rent, and in a suit by him against the putnidars it was held that he was entitled to be reimbursed the amount by them The fact that the

(k) *Dalhina Mohan Roy v Saroda Mohan Roy* (1893) 21 Cal 140 20 L R I A 160 same principle applied *Agendra Nath Roy v Jugal Kishore Roy* (1905) 29 C W N 1082 90 I C 281 A I R 1905 Cal 1097 followed *Sita Fakir v Chand Dewa* (1908) 108 I C 46 A I R 1908 Cal 359 *Bhora Haras Lal v Bhora Saurang Lal* (1930) 103 I C 330

(l) 21 Cal 148

(m) *Chinnasamy v Rathnasabapathy* (1903) 97 Mad 338

(n) *Bndubashini Dass v Harendra Lal Pooj* (1897) 25 Cal 300 *Serafat Ali v Sheikh Israr Ali* (1917) 22 C W N 347 42 I C 30

(o) *Radha Madhub Samanta v Sastri Ram Sen* (1899) 26 Cal 806

tion of a decree obtained by the landlord in a suit for arrears of rent comes within this section, though the suit was brought against some only and not all of the putnidars (e). Similarly, where A's goods are wrongfully attached in order to realise arrears of Government revenue due by B, and A pays the amount to save the goods from sale, he is entitled to recover the amount from B (f). A Hindu reversioner is interested in the payment of arrears of Government revenue which a Hindu widow is bound to pay in respect of property in which she has a widow's estate, and he is entitled to recover the same from the widow (g). So also is he interested in making a deposit under Order XXI, rule 89, of the Code of Civil Procedure, to have a sale in execution of a decree against a Hindu widow set aside, the sale being of the entire interest in the property sold and not merely the widow's interest (h). A Hindu mother who has incurred expenses for her daughter's marriage is entitled to recover the expenses from her husband's coparceners. The liability of the coparceners is clearly one which arises under the Hindu law, but it has been said though not without some difference of opinion that it also arises under this section (i). Where A makes a gift of a portion of land to B himself undertaking to pay the *judi* in respect of it and then makes a gift of the rest of the land to C subject to the condition that C shall pay the *judi* in respect of the whole land, B is entitled on failure of C to pay the *judi* to make the payment and to recover it from C (j).

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(e) *Prasanna Kanti v. Hysal* (1917) 21 C.W.N. 68, 411 C. 26.

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(g) *Sankaran v. See G. S. S. S.* (1909) 19 Mad. L. 1, 351.

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decision of the first Court was in favour of the defaulting putnidars did not affect the plaintiff's right to pay the rent, as it was quite possible that that decision might have been reversed on appeal. But a person in wrongful possession of land making payment of Government revenue is not interested within the meaning of this section (p). A agrees to sell land to B. Subsequently A, in breach of the agreement, agrees to sell the land to C. B sues A and C for specific performance. Pending the suit the land is sold in execution of a decree obtained by A's creditor against A. B deposits in Court the amount required to be deposited under Order XXI, rule 89, of the Code of Civil Procedure, and the sale is thereupon set aside. B, having no title in the property and no possession in it at the time of the payment, was not interested in the payment and he is not entitled to recover it from A or C (q).

In *Ram Tuhul Singh v Biseswar Lal* (r) the Judicial Committee in dealing with the rights of parties making payments observed "It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be concluded by nice considerations of what may be fair and proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt. Thus a mortgagor who voluntarily pays the assessment on land mortgaged by him, forestalling the mortgagee in possession, who it is found, was willing to pay the assessment as he had done for years past, is not entitled to recover from the mortgagee the amount so paid by him (s). Similarly, payment made by a mortgagee to prevent the sale of the mortgaged property in execution of a decree against the mortgagor cannot be recovered from the mortgagor if the mortgage was prior to the execution proceedings (t). And where A, B's nephew, believing that he was the heir of B, paid the amount of a decree held by C against B to prevent the sale of B's property, and it was subsequently declared in a suit that A was not B's heir, it was held by the High Court of Allahabad that the payment made by

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(p) *Banda Kuar v Bhonda Das* (1885) 7 All 665. (q) *Hari Das* (1911) 11 C W N 391 393 311 C 311.  
 (r) *Nand Lal & Co v Tarao Man* (1917) 21 at 1 J 67 421 C 833. (s) *Imchandrar Bhatram v Imchadar* (1892) 1 B 11 1 B 371.  
 (t) (1875) 23 W R 30, 15 B 1 B. (f) *Imchandrar v Girdhar* (1877) 209; 1 B 21 A 131; *Imchandrar* All W N 210.

A was a purely voluntary and gratuitous one, and as such could not be recovered (u) This decision does not appear to be in accord with later decisions of the same Court (v)

**Suit for contribution**—Whether this section applies to a suit for contribution where *both* the plaintiff and the defendant were liable for the money paid by the plaintiff is not clear on the authorities (w) In *Mothooranath v. Kristokumar* (x), where portions of a property subject to a mortgage were purchased by the plaintiff and the defendant respectively, and the plaintiff alone paid the entire amount of the mortgage debt to prevent the estate from sale, it was held by the Calcutta High Court that the plaintiff was a person interested in the payment within the meaning of this section, and that he was entitled to contribution from the defendant In a subsequent case the same High Court doubted whether a suit for contribution in respect of money for which the plaintiff and the defendant in the contribution suit had been made jointly liable by a former decree fell within the scope either of this or the next following section (y) The Court was inclined to think that those sections seemed rather to contemplate persons who, not being themselves bound to pay the money or to do the act, did it under circumstances which gave them a right to recover from the person who had allowed the payment to be made and had benefited by it In a still later case (z), where one co sharer of land sued another co sharer for contribution for rent of the land paid by him it was held that the plaintiff was not entitled to recover under this section as the defendant was wrongfully kept out of possession by the plaintiff But for that circumstance it was said contribution could have been recovered The Court observed It seems to us that the provisions of s 69 of the Indian Contract Act, upon which the plaintiff founds his right of suit, are not applicable to such a suit as the present That section we think, contemplates a case in which there are several co sharers in

(u) *Sumar Singh v. Shib Lal* (1882) All W N 149

(v) *Akushal Singh v. Akawani* (1906) All W N 282 *Tulsi Kunwar v. Jageshar Prasad* (1906) 28 All 513 nor with *Jemabena Pao v. Nayana Pao* (1906) 29 I C 813 A I P 1927 Mad 459

(w) As to contribution between joint promisors and co sureties see ss 43 and 44

(x) (1878) 4 Cal 369

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(z) *Sir Ramo e Dobi v. Haro Das Poy* (1900) 6 C W N 603

decision of the first Court was in favour of the defaulting putnidars did not affect the plaintiff's right to pay the rent, as it was quite possible that that decision might have been reversed on appeal. But a person in wrongful possession of land making payment of Government revenue is not interested within the meaning of this section (p). A agrees to sell land to B. Subsequently A, in breach of the agreement, agrees to sell the land to C. B sues A and C for specific performance. Pending the suit the land is sold in execution of a decree obtained by A's creditor against A. B deposits in Court the amount required to be deposited under Order XXI, rule 89, of the Code of Civil Procedure, and the sale is thereupon set aside. B, having no title in the property and no possession in it at the time of the payment, was not interested in the payment and he is not entitled to recover it from A or C (q).

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(p) *Binda Kuar v Bhonda Das* (1885) 7 All 660. *v Hari Das* (1911) 21 C W N 394 399, 34 I C 311.

(q) *Land Aishore v Parao Mian* (1917) 2 Pat L J 676 42 I C 839. (r) *Pamchandra Umaram v Dimodar Pamchandra* (1899) 1 Bom I R 371.

(s) (1875) 23 W R 305 15 B L R 208, 1 R 2 I A 131. (t) *Ram Prasad v Salik Pam* (1882) All W N 210. *Panchkore*

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possession of land and where some of them having neglected to pay what is due from them in respect of the occupation of the land, one of their number pays what is due from all. He may then recover contribution from the rest. But here the plaintiff sues to recover expenses which he had by the wrongful appropriation of the profits of the defendant's share already received." Still later the opinion was expressed that the section contemplates only those cases where payment is made by a person under no legal liability to make it, and for another person who is bound in law to pay it (a). The view taken in the most recent cases is that this section applies to suits for contribution where both the plaintiff and the defendant were liable for the money paid by the plaintiff (b). This view, it is submitted, is sound. The section is general in its terms, and there is no reason why attempts should be made to restrict its operation. In any event suits of this character would come within the scope of s. 70. See notes to s. 70 under the head "Contribution," p. 395, below.

The Madras High Court has held that this section does not apply to suits for contribution at all (c).

"Money which another is bound by law to pay."—In *Mothooranath v. Kristokumar* (d), above cited, it was contended that this section applied only to cases where the person who is there called "the other" was personally liable for the debt, and that it did not apply where, as in that case, the liability attached to the land. The Court overruled this contention and said—"It is clear from the illustration that that is not the intention of the Legislature. The illustration gives the case of a lessee paying off revenue due to Government, but the liability to pay revenue due to Government is not a personal liability of the zamindar, but a liability which is imposed upon the zamindar's land. It is therefore clear that that section was intended to include the cases not only of personal liability, but all liabilities to payments for which owners of lands are indirectly liable, those liabilities being imposed upon the lands held by them."

(a) *Manindra v. Jamahir* (1905) 32 Cal 643 at p. 645, *Jinnat Ali v. Fateh Ali* (1911) 15 C. W. N. 332, 334.

(b) *Pam Lal v. Ahiroda Mohini* (1913) 18 C. W. N. 113, *Irocinno Kumar v. Jamalul Din* (1913) 18 C. W. N. 327.

(c) *Jayapal rayu v. Salra sannama trad* (1916) 31 Mad. 800, 903, 31

I. C. 255

(d) (1878) 4 Cal. 369 followed in *Chandralaja v. Bhagaban* (1910) 23 Cal. L. J. 125, 32 I. C. 200, *Sirajubai v. Poy Chaudhurani v. Kamini Kumar Chaudhury* (1913) 91 I. C. 811, A. I. R. 1926 Cal. 705.

“Bound by law”—The liability for which payment may be made under this section need not be statutory. In a Calcutta case cited above (e) it was argued that the words “bound by law” restricted the section to liabilities created by some statute, such as liabilities to pay revenue, but excluded liabilities which arose out of contracts by parties. The Court declined to uphold this contention and observed “That would be putting on the section far too narrow a construction, because it was no doubt intended to include such a case as a lessee paying rent to the superior landlord for which the intermediate lessee was liable under a covenant.” Contractual liability, on the other hand, is not a necessary element (f).

An action to recover money paid is not maintainable under this section unless the person from whom it is sought to be recovered was bound by law to pay it. Thus revenue due on land owned by one who is not the registered holder is not money which such an owner is bound to pay under the Madras Revenue Recovery Act II of 1864 though it may be to his interest to do so, and the registered holder voluntarily paying such revenue cannot recover it under this section (g). Similarly, payments made by a second mortgagee to save the mortgaged property from sale in execution of a decree for rent obtained by the zamindar against the mortgagor under the Bengal Tenancy Act cannot be recovered by him from the first mortgagee, as the latter is not bound under s. 69 of that Act to pay the rent due by the mortgagor to the zamindar (h). And where the income tax authorities assessed the widow of a deceased Hindu in respect of outstandings forming part of the estate of the deceased notwithstanding remonstrances on her part that the outstandings had not come to her, but had been bequeathed under the will of the deceased to the defendants and the widow paid the tax it was held that she could not recover the amount from the defendants under this section, for the defendants not being

(e) *Mothooranath v. Arisolkumar* (1888) 4 Cal 369, 373.

(f) *Rasappa Pillai v. Doraisami Peddhar* (1925) 90 I C 545, 49 Mad L J 88, A I R 1925 Mad 1041.

(g) *Boja Sellappa Reddy v. Vidhachala Reddy* (1907) 30 Mad 30. *Subramania v. Mahalingasami* (1909) 33 Mad 41. *Puthempurayal v. Mangalasseri*

(1912) 24 Mad L J 548, 15 I C 26.

(h) *Gangadas v. Jogendra* (1907) 11 C W N 403. “So a person holding over in trespassory occupation of land after he has sold his interest therein is not bound by law to pay the zemindar’s dues.” *Payada Ramakrishnaiah v. Barrey Nayarasu* (1920) 91 I C 603, A I R 1926 Mad 152.

authorise is not lawfully made for this purpose (p) Similarly, where a purchaser of property, the sale being fictitious and so found by the Court in a previous litigation, paid the amount of a decree obtained by a third party against his vendor to prevent the property from being sold in execution, it was held that the payment was not "lawfully" made, and that the purchaser could not recover it from the vendor (q) A payment in satisfaction of a decree, by a person who is a party to the decree and is bound thereby, is a payment made "lawfully" within the meaning of this section (r)

"Does."—This expression includes payment of money It must not be supposed that because s 69 provides for the case of payment of money, therefore the present section excludes that case There may be cases in which a person who is bound to pay a certain sum of money would not necessarily be benefited by its payment by another Those cases would fall under s 69, for benefit received by the payment of money is one of the conditions necessary to the application of this section (s)

"For another person"—The principle underlying this section was adopted in a Calcutta case (t) decided in 1881, but without any reference to the Contract Act In that case the plaintiffs, *bona fide* believing that they were the owners of a four annas share and that the defendants were the owners of the remaining twelve annas share in a putni paid to the zamindars their share of the revenue In a suit between the parties it was declared that the plaintiffs had no share in the putni,

(p) In other words this section cannot be used to hold the promisor in a void agreement liable as on a quasi contract see *Punjabia v Bhagwandas* (1928) 53 Bom 309, 117 I C 518

(q) *Janaki Prasad Singh v Baldeo Prasad* (1908) 30 All 167 In this case the Court thought that the payment was possibly made with some sinister object, *Panchkora v Haridas* (1916) 21 C W N 391 74 I C 341 Contrast *Murlidhar v Bhikhi* (1885) All W N 219 *Mohar Singh v Sher Singh* (1883) Punj Rec no 42 A later case of this class is *Mulai Nath v Shyam Sunder Lal* (1929) All I J 801 (payment off of incumbrance as part of transaction otherwise

invalid, facts not clearly given), cp *Kundan Lal v Bhikhar Das* (1929) All I J 333 (hundis not properly stamped)

(r) *Serafat Ali v Issan Ali* (1918) 45 Cal 691 42 I C 30

(s) *Smith v Dinonath* (1885) 12 Cal 213 217, *Desai Himatsingji v Bhavabhai* (1880) 4 Bom 643 *Nath Prasad v Baij Nath* (1880) 3 All 66, *Nobin Krishna Bose v Mon Mohun Bose* (1881) 7 Cal 573

(t) *Nobin Krishna Bose v Mon Mohun Bose* (1881) 7 Cal 573 *Smith v Dinonath* (1885) 12 Cal 213 *Upendra Chundra v Tara I rosinna* (1903) 30 Cal 791

and that the defendants were entitled to the whole of it. Subsequently the defendants paid to the zamindars the revenue on the twelve annas share only, availing themselves of the payment by the plaintiffs. It was held that upon those facts the plaintiffs were entitled to recover from the defendants the amount paid by them on the principle that "where a payment is made by one person for the benefit of another, and that other afterwards adopts that payment and avails himself of it the sum becomes money paid for his use". It is not necessary to the application of this section that the defendant must not only have benefited by the payment, but also have had an opportunity of accepting the payment (u). But payment made against the will of the defendant and in the course of a transaction which in one event would have turned out highly profitable to the plaintiff and extremely detrimental to the defendant could not be said to have been made for the defendant, though in the event which took place it may have proved beneficial to him (t). Similarly, payment of revenue by the plaintiff while in wrongful possession of the defendant's land and for his own benefit and his own account could not be recovered under this section (w). And it has been held that if A is assessed by the income-tax authorities and protests that B is the party properly liable but pays the tax, A cannot recover the amount from B, for A cannot be said to have made the payment for B (x). It is quite clear that where the object of the payment is to benefit the plaintiff himself the payment cannot be said to have been made for the defendant (y). But it is not clear whether the expression "another person" includes a minor. There are no cases in point (z) but there seems to be no reason why on principle the expression should not be interpreted as comprising the case of a minor (a).

(u) *Chandra Deo v Srinivasa* (1915) 38 Mad 235 241 243. *Saptarishi v Secretary of State for India* (1915) 28 Mad L J 384 dissenting to that extent from *Yogambal v Naina Pillai* (1910) 33 Mad 15 see also *Jognarain v Badri Das* (1912) 16 Cal L J 156 13 I C 144.

(v) *Ram Tulul Singh v B seswar Lal* (1875) 23 W R 305 15 B L R 403 L P 2 I A 131.

(w) *Binda Kuar v Bhowla Das* (1895) All 660.

(x) *Raghavan v Alamelu Ammal* (1907) 31 Mad 35.

(y) *Tangja Fala v Trinbal Daga* (1916) 40 Bom 646 651 35 I C 791.

(z) In *Venkata v Timmayya* (1898) 22 Mad 314 it was held that assuming the section applied to the case of a minor it did not apply under the particular circumstances of the case. See also *Branson v Appasami* (1891) 17 Mad 257.

(a) *Whitley Stokes Anglo Indian Codes* vol I 585 note 3.

Mistake of law is not expressly excluded by the words of this section; but s 21 shows that it is not included "The man who has chosen to judge his own cause upon all the facts, and has decided against himself, cannot appeal to the Court against his own judgment, whether it was well informed or not" (h) Thus payment made by A to B upon a misconstruction of the terms of a lease (i) or misunderstanding of an official scale of charges (j) cannot be recovered back.

A debtor may recover from a creditor the amount of an over payment made to him if it was made by mistake (k) But where A pays money to B who, A knows, is C's agent, under a mistake, A is not entitled to recover the money from B, if before demand made upon B, B has paid the amount to C, or, if he has not, has yet done some act to his own detriment as regards his principal (l) It has been so held by the High Court of Bombay, in accordance with English law (m) Misdescription by inadvertence of the account on which a payment is made may be deemed a mistake of fact (provided of course that the payee could not be honestly misled by it) (n) Similarly, misdescription of parcels in an auction sale may be relieved against in a proper case even if the sale was through the intervention of the Court (o)

(h) Pollock, Law of Fraud in British India, 128 See also *Wolf & Sons v Dadyba Khmiz & Co* (1920) 44 Bom 631, 648, 666, 58 I C 465

(i) *Khozan Sing v The Secretary of State* (1878) Funi, Rec no 33

(j) *Apparao Chettiar v S I R Co* (1928) 114 I C 358, (1928) Mad W N 885 A I R 1929 Mad 177

(k) *Badr un nisa v Muhammad Jan* (1880) 2 All 671, 674

(l) *Solomon Jacob v The National Bank of India* (1918) 42 Bom 16, 32-35, 48, 42 I C 869 See also *K M P R Firm v The Official Assignee of Malras* (1922) 43 Mad L J 142 70 I C 751, A I R 1923 Mad 17

(m) In an earlier Allahabad case it was held that an agent for collection who had innocently presented to the treasury a forged draft and received payment of money was liable to repay the money

though he had handed it over to his principal The Court purported to follow *Tugman v Hopkins* (1842) 4 Man & G 389 which was not a case of payment by mistake, but of an unlawful taking by the defendant of money found lying in a room, and expressly decided on the ground that he was a trespasser The Allahabad decision, it is submitted, is wrong and was rightly dissented from by the High Court of Bombay *Shugan Chand v The Government of North Western Provinces* (1875) 1 All 73

(n) *Pamaswami Naicker v Narayana swami Naicker* (1925) 90 I C 906, A I R 1925 Mad 762 Here the defendant took advantage of a mistake which must have been apparent to him cp James L J's remarks in *Tumlin v James* (1880) 15 Ch D 221

(o) *Uzir Ali v Narayannassa Jib*, 116 I C 631, A I R 1928 Cal 805

**Coercion**—The Judicial Committee has laid down that the word “coercion” in this section is used in its general and ordinary sense and its meaning is not controlled by the definition of “coercion” in s 15. Accordingly where A who had obtained a decree against B obtained an attachment against C’s property, and took possession of it to obtain satisfaction for the amount of the decree, and C on being ousted from his property paid the sum claimed under protest, C was held entitled to recover the sum as money paid under “coercion” within the meaning of this section (p). It was formerly held in India that “coercion” in this section meant the same thing as “coercion” in s 15, and therefore no act was “coercion” unless it was done “with the intention of causing any person to enter into an agreement” as required by the definition in that section, nevertheless where the defendant had received money which in justice and equity belonged to the plaintiff under circumstances which rendered the payment involuntary, and the receipt by the defendant to the use of the plaintiff, the plaintiff could recover the money, but the case was not within the present section (q). This view is now superseded, as the action is maintainable under s 72, it is immaterial whether the language used in the judgment by the Judicial Committee as to s 72 being “exhaustive” (r) is right or wrong, but, if it were material, we should think it wrong. In *Fatima Khatoon v Mahomed* (s), the plaintiffs, who were Mahomedan ladies, were entitled to a charge on certain property in respect of their dower. The defendants, who were holders of a decree against the heirs and representatives of the person to whom the property belonged, obtained leave in execution proceedings to sell the property. In order to prevent that sale, which would have been injurious to them, the plaintiffs paid under protest the amount of the defendants’ decree into Court. In a suit to recover back the amount it was held by the Judicial Committee that the payment was made not voluntarily but under a species of compulsion and that they were there

(p) *Seth Kanhaiya Lal v National Bank of India* (1913) L P 40 I A 56 40 Cal 598, 18 I C 949, followed *Ah Choon v T S Firm* (1927) 5 Rang 653 106 I C 468, A I R 1928 Rang 55

(q) *Jugdeo Narain Singh v Pajab Singh* (1888) 15 Cal 656 664-665 [payment made under the force of execu-

tion proceedings] *Narayanram v Osura Reddi* (1901) 25 Mad 548 552 [payment made to prevent wrongful sale of plaintiff’s holding] See also *Collector of Cawnpore v Kedars* (1881) 4 All 19 20

(r) L P 40 I A 58

(s) (1868) 12 M I A 63 10 W P P C 29

fore, entitled to a decree And in a subsequent case it was held that a payment made by the purchaser of a property to prevent its sale in execution of a decree obtained by a mortgagee whose debt had been satisfied can be recovered back, as it was made "under force of these execution proceedings" (t) Similarly money paid as income tax under threat of attachment may be recovered back under this section (u) And where a person who is charged with a non compoundable offence is induced to pay money to the complainant to stifle the prosecution, he may recover the money so paid under this section (v), but not if no pressure or compulsion was exercised upon the accused (w) Where a plaintiff has a statutory right to recover money under this section, his claim should not be rejected on the ground that, upon a consideration of the whole circumstances, it is not equitable that the money should be repaid (x)

**Wrongful payment**—There is a class of cases which, though not directly bearing on this section, may be conveniently dealt with in this place They are cases where money is paid in execution of a decree, and it is sought to recover back the amount on the reversal of the decree In such a case the payment, though in the first instance lawful, becomes wrongful on the reversal of the decree (y) The rule of law on this subject is that money paid under a decree cannot be recovered back in a fresh suit whilst the decree remains in force But if the decree is reversed or superseded the amount paid under it is recoverable And it has been held in effect by the Judicial Committee that a decree will be deemed to be superseded, though not actually reversed, if it was made pending an appeal to a higher Court from an antecedent decree on the same cause of action, and the latter decree is reversed by the appellate Court, and the order of reversal was intended to deal with all the rights and liabilities of the parties under it (z), the principle

(t) *Dulichand v Ramkishen Singh* 33 I C 711  
(1881) 7 Cal 648, S C L R 8 I A 93

(u) See *Forbes v Secretary of State for India* (1915) 42 Cal 151, 154-155, 26 I C 893

(v) *Muthucierappa v Pannaswami* (1917) 40 Mad 285 31 I C 401

(w) *Amyadennesia Bibi v Fakim Bulah* (1915) 42 Cal 286 *Ban leshari Prasad v Lekhranj Sahu* (1916) 1 Pat L J 48, 60-61,

(z) *Kanhaya Lal v National Bank of India Ltd* (1923) 1 R 50 I A 162, 4 Lah 284 75 I C 7, 1 I R 1923 P C 114

(y) *Per Cur Jogesh Chunder Dutt v Kali Churn Dutt* (1877) 3 Cal 30 78

(c) *Shama Parshad Roy v Hurro Parshad Roy* (1865) 10 M I A 207 followed by a majority of the Full Bench in *Jogesh Chunder Dutt v Kali Churn*

being that where the main decree which is the basis of subsequent decrees is reversed the latter decrees, being subordinate and dependent decrees, are superseded (a) See Code of Civil Procedure, 1908, s 140

Compare s 86 of the Indian Trusts Act, 1882, which provides that where property is transferred in pursuance of a contract which is liable to rescission, or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid

## CHAPTER VI

### OF THE CONSEQUENCES OF BREACH OF CONTRACT

**73.**—When a contract has been broken (b), the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as

*Dutt* (1877) 3 Cal 30 In the former of these cases there were several decrees for interest on a bond, in the latter for enhanced rent The reversal of one of those decrees by the Privy Council was held to have superseded all other decrees obtained during the pendency of the appeal to the Queen in Council so as to give a right for the recovery of the amount paid under them

(a) (1877) 3 Cal 30, 37, 38 See

*Kishen Sahas v Bakhtawar Singh* (1898) 20 All 237, where it was held that there was no such supersession of the decrees as in the Privy Council cases cited above

(b) This section is declaratory of the Common Law as to damages *Jamal v Moolla Darood Sons & Co* [1916] 1 A C 175, 43 I A 6, 11, 43 Cal 493, 503 31 I C 949 As to the recovery of interest by way of damages, see p 432, below

if such person had contracted to discharge it and had broken his contract (c)

*Explanation*—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account

*Illustrations*

(a) A contracts to sell and deliver 50 maunds of saltpetre to B at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A by way of compensation the sum if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

[*Note*—*Market rate*—Under a contract for the sale of goods the measure of damages upon a breach by the buyer is the difference between the contract price and the market price at the date of the breach. If the seller retains the goods after the breach, he cannot recover from the buyer any further loss if the market falls, nor is he liable to have the damages reduced if the market rises (d)]

Generally it is 'quite settled that on a contract to supply goods (e) of a particular sort which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach.' But the subject matter of the contract may not be marketable. In that case the value must be taken as fixed by the price which actually has to be paid for the best and nearest available substitute. *Hinde v Liddell* (1875) L. R. 10 Q. B. 265, 269, *Elbinger Actien Gesellschaft v Armstrong* (1874) L. R. 9 Q. B. 473, 476. Where no such substitute is available, then if there has been a contract to resell them the price at which the contract was made will be evidence of their value, but if there has been no such contract the market value may be estimated by adding to their price at the place where they were purchased the

(c) *Anrudh Kumar v Lachhmi Chand* (1928) 50 All 818, 115 I C 114, A I R 1928 All 500

(d) *Jamal v Moolla Dawood Sons & Co* [1916] 1 A C 175 43 I A 6, 43 Cal 493 31 I C 919. Collateral circumstances will not alter the general rule. *Bolsett v Venkatanarayana v Tel*

*kalagaddalakshmi Punnayya* (1928) 115 I C 342, A I R 1928 Mad 1249. *Gp Mehr Chand v Jugal Kishore Gulab Singh* (1923) 85 I C 317, 6 Lah L J 415

(e) Including shares in a company, see *Williams Bros v Fd T Agius* [1914] A C 510

costs and charges of getting them to their place of destination, and the usual importer's profits *Borries v Hutchinson* (1865) 18 C B N S 445, 41 R R 563, *O'Hanlan v G W Ry Co* (1865) 6 B & S 481, *Cooverjee Bhoja v Rajendra Nath* (1909) 36 Cal 617, *Hajee Ismail & Sons v Wilson & Co* (1918) 41 Mad 709, 715, 45 I C 942 (cc)

Again, if the buyer, after giving the seller time at his request, finally has to go into the market and buy at an advanced price, he may recover the whole difference between the contract price and the price he actually paid *Ogle v Earl Vane* L R Ch (1868) L R 3 Q B 272 "The defendant, in effect, bought forbearance, and must pay for it" Willes, J, at p 280 Accordingly the decisive date for fixing the damages is the last date to which the contract was extended *Kidar Nath Behari Lal v Shimbhu Nath Nandu Mal* (1926) 8 Lah 198, 99 I C 812, A I R 1927 Lah 176 But where no such request has proceeded from the seller, the buyer is not entitled to anything more than the difference between the contract rate and the market rate at the date of the breach, though he may not have pressed for delivery on the due date *Muthayamanigaran v Lakku Reddian* (1912) 22 Mad L J 413 Nor does time spent in survey of the goods postpone the date of breach (f)

The fact that the buyer sustains no actual loss from the seller's failure to deliver the goods is no ground for awarding merely nominal damages to the buyer The buyer is entitled, as indicated by illustration (a) to the section, to receive from the seller by way of compensation the sum by which the contract price falls short of the price for which the buyer *might* have obtained goods of like quality at the time when they ought to have been delivered (g)

"Obviously value created for special purpose is irrelevant, and it is for this reason that the prices made by bulls and bears are of no use to us If the market value is uncertain, then we must have recourse to such surrounding circumstances as affect the probabilities, and among them to real prices proved about the time of due date Now market price is to a great extent based on, and made up of the

(cc) As to the case of a buyer failing to accept goods made to his order and of such a kind that they have no market price, *Re Vic Mill* [1913] 1 Ch 183, in C A [1913] 1 Ch 465, where the question was treated as being wholly on the

facts

(f) *Ramchandra Pamrallabh v Passany Sons & Co* (1921) 45 Bom 129, 57 I C 978

(g) *Hajee Ismail & Sons v Wilson & Co* (1918) 41 Mad 709, 45 I C 942

views of, those engaged in a particular business and familiar with its incidents. These views are based not only on transactions in which a man may himself have been actually engaged, but also on the general rumour and reputation in the market. Therefore, a man may be a competent witness for the purpose of testifying to market value, though he may not himself have been engaged in or carried through any dealing in the market at the particular date in question. We cannot then exclude from consideration any evidence on this point, merely because the deponent may not himself have bought or sold on the due date" (h)

**Market rate : limits of rule**—The market rate, however, is only a presumptive test. "it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed" and the rule as to market price "is intended to secure only an indemnity" to the purchaser. "The market value is taken because it is presumed to be the true value of the goods to the purchaser." If he does not get his goods he "should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when the delivery of goods purchased is delayed the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for in the open market, and when they are in fact delivered they are similarly presumed to be for the same reason, worth to the purchaser what he could then sell for in that market." There is an important exception "if in fact the purchaser, when he obtains possession of the goods sells them at a price greatly in advance of the then market value." In such a case he must allow for the profit he actually makes and can recover only his actual loss, otherwise he would be placed in a better position than if the contract had been performed. So the law is explained by the Judicial Committee in *Wertheim v Chicoutimi Pulp Co* [1911] A C 301, 307, 308 (i). *Cp the British Westinghouse, Etc, Co's Case*,

(h) *Shrikanth Gopinath v Gordhandas Godallias* (1902) 26 Bom 235 239. In the first sentence purpose appears to be a misprint for 'purposes'.

(i) Note that this was a case not

of delivery withheld but of delivery delayed. *per Lord Dunedin* [1911] A C 522. As to what are called accidental circumstances as between seller and buyer see p 436 f w.

p 421, below. Still less is there a fixed rule in the less simple case of wrongful conversion of a principal's goods by his agent (j)

A agrees to purchase B's house at Rs 5500. A afterwards refuses to complete the purchase. The house is then sold by auction in execution of a decree against B, and realises Rs 3,100 net. B is entitled to receive from A by way of compensation Rs 2,400. *Mohunlal Tribhovandas v Chumilal Harinarayan* (1902) 1 Bom L R 811, *Nabinchandra v Krishna* (1911) 38 Cal 158.

Where the defendant contracted to deliver to the plaintiff at Bombay 1,000 tons of a certain species of coal from February to June, and failed to deliver any of the coal, and no purchase was made by the plaintiff against the defendant's contract, and there was practically no coal in Bombay of the description contracted for at the dates at which delivery should have been given, the Court received in evidence a statement produced by the plaintiff showing the rates at which he had during the contract period settled certain contracts for the same coal with other persons, to ascertain the actual value of the coal on the dates of the breach. *Jaghomundas v Nusserwanji* (1902) 26 Bom 711.]

(b) A hires B's ship to go to Bombay, and there take on board, on the first of January, a cargo which A is to provide, and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

[Note.—A contracts with B to provide a ship on a certain day to receive a cargo of coal to be carried to Havre. A fails to provide the ship in time, and B has to charter vessels at an advanced freight and also buy coal at a higher price. B can recover from A the increase of price as well as the increase of freight, unless A can show that, by reason of a corresponding increase in the market price at the port of delivery or otherwise, the loss is compensated wholly or in part. *Featherston v Wilkinson* (1873) L R 8 Ex 122. A contracts with B to sell and deliver goods which on the day appointed for delivery are worth Rs 80 per ton. They are delivered later on a day when they are worth only Rs 50 per ton, but meanwhile A has sold them for

Rs. 70 per ton. A. is entitled to damages only for his actual loss of Rs. 10 per ton: *Wertheim v. Chicoutimi Pulp Co.* [1911] A C 301 (see p 408, above) ]

(c) A. contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B. can obtain for the rice at the time when A informs B that he will not accept it.

[Note.—Where no time fixed for delivery.—If in the case put above A. gave notice to B. that he would not take delivery beyond a certain date, and delivery is not made within that time, the measure of damages would be the difference between the contract price and the market price on that date: *Gauri Datt v. Nanik Ram* (1916) 14 All. L J. 597, 35 I. C. 203.]

(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B. to take a cargo of jute to Mirzapur for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course and its market price at the time when it actually arrived.

[Note.—Late delivery.—There is not any general rule that damages cannot be recovered for loss of market on a voyage by sea: "wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea as of a land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases": *Dunn v. Bucknall Bros* [1902] 2 K. B. 614, 622, C. A. *per Cur.*, holding that the earlier decision of the C. A. in *The Parana* (1877) 2 P. Div. 118, had not laid down anything to the contrary. It must depend on the circumstances, including the character of the navigation undertaken, what amount of reasonable anticipation can be held practicable. Modern commerce tends to become more certain by sea no less than by land, and perhaps in a more marked degree ]

## DELIVERY BY INSTALMENTS

(f) A contracts to repair B's house in a certain manner and receives payment in advance. A repairs the house but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year from the first of January, for a certain price. Freight rises and on the first of January the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

[Note — Delivery by instalments—Anticipatory breach —If the iron was to be delivered by instalments at certain dates *e.g.*, at the end of the three months of September, October, and November, the measure of damages is the sum of the differences between the contract and the market price of the several instalments on the respective final days for performance. *Brown v Muller* (1872) L R 7 Ex 319, and the same rule is applied where the seller, before the expiration of the whole time for performance, has refused to complete the contract, and the buyer has treated the refusal as an immediate breach (see pp 287, 288, above), unless the seller can show that the buyer could have obtained a new contract on better terms. *Roper v Johnson* (1873) L R 8 C P 167, *Krishna Jute Mills Co v Innes* (1911) 21 Mad L J 182.

If a vendor has a specified time allowed to him to deliver goods (the option was to deliver in August or September), and before the expiry of that time he gives notice to the purchaser that he will be unable to perform the contract, and the purchaser does not rescind the contract (as he may do under s 39) the measure of damages is the difference between the contract price and the market price on the last day of the period limited (*i.e.*, in this case the last day of September). *Mackertich v Nobo Coomar Roy* (1903) 30 Cal 477, following *Leigh v Paterson* (1818) 8 Taunt 540, 20 R R 552. If the contract is for delivery in August and September, the damages are distributable according to *Brown v Muller*. *Cooterjee Bhoja v. Rajendra Nath* (1909) 36 Cal 617. If the contract is for sale of a certain quantity of goods, and it is stipulated "shipments to be made by steamers during July to December, the agreement to be construed as a separate contract in respect of each shipment," the instalments must be deemed to have been intended to be distributed

rateably over the months from July to December, and the damages are distributable according to *Brown v Muller* *Bilasram v Gubbay* (1916) 43 Cal 305, 33 I C 1

A, a stockbroker, closes the account of a client, B, prematurely and without instructions instead of carrying it over to the next settlement, as on the facts and the true construction of their agreement he ought to have done. B informs A that he insists on the performance of the contract. A cannot claim to have the damages assessed with reference to the price of stocks at the date of closing the account, but B is entitled to claim damages assessed according to the prices at the date fixed for performance, *quære* whether according to the highest price reached in the interval *Michael v Hart & Co* [1902] 1 K B 482 C A J

With regard to several deliveries under one contract, where the defendant agreed with the plaintiff to purchase from him gunny bags of which delivery was to be given at certain stated times and the defendant failed to take delivery, it was held that the proper measure of damages was the difference between the contract price and the market price at the dates of failure by the defendant to take delivery *Cohen v Cassim Nana* (1876) 1 Cal 264

(1) A delivers to B a common carrier a machine to be conveyed without delay to A's mill informing B that this mill is stopped for want of the machine. B unreasonably delays the delivery of the machine and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B by way of compensation the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed but not the loss sustained through the loss of the Government contract.

[Note—Notice of special circumstances—The facts in *Hadley v Baxendale*, 9 Ex 341, 96 R R 712, were somewhat like these, except that the defendants did not know that the plaintiffs' mill was stopped for want of part of the machinery which they were to supply. They were held not liable for loss of profit. It may be collected from the judgment that with knowledge they would have been liable. As to the general rule there laid down see the commentary below. The loss of profits on a contract of which the defendant had not notice is clearly too remote. But where the defendant failed to supply an essential part of a machine which the plaintiff, to his knowledge, was under contract to supply to a third person and the plaintiff, by the defendant's default, lost the benefit of that contract the defendant

## NOTICE OF CONTRACT OF RESALE

was held liable both for the loss of profit and for the plaintiff's charges in making other parts of the machine *Hydraulic Engineering Co v McHaffie* (1878) 4 Q B Div 670

B delivers to A several cases of machinery to be carried by sea from Bombay to Karachi for the purpose of building a mill. On arrival at Karachi one of the cases containing indispensable parts of the machinery, is not to be found. A knew that the cases contained machinery, but did not know the specific contents of each case. A is liable to pay B by way of compensation the value of the lost case, freight and interest, but not the profits lost by the mill not having been set up at the time intended. (See *British Columbia Sawmill Co v Nettleship* (1868) L R 3 C P 499)

A, who makes a business of collecting and forwarding telegrams, contracts with B to forward a ciphered cable message from Calcutta to X, who is B's correspondent in London. The message conveys no meaning on the face of it. A negligently fails to forward the message in due time, and B loses the profits which he would have made if X had duly received and acted upon it. A is not liable to B for these profits as he had no means of knowing what would be the consequences of a breach of his contract. *Saunders v Stuart* (1876) 1 C P D 326]

(1) A having contracted with B to supply B with 1 000 tons of iron at 100 rupees a ton to be delivered at a stated time contracts with C for the purchase of 1 000 tons of iron at 80 rupees a ton telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A who cannot procure other iron and B in consequence rescinds the contract. C must pay to A 20 000 rupees being the profit which A would have made by the performance of his contract with B.

[Note—Notice of contract of resale.—If C only knew generally that A wanted the iron for resale he would not be entitled to damages beyond the difference between the contract price and the market price at the date of the breach. *Tlul v Henderson* (1881) 8 Q B D 457. If there is no market price the measure of damages is the difference between the resale price and the contract price. *Patrick v Russo-British Grain Export Co* [1927] 2 K B 535 (*Tlul v Henderson* is not cited)]

B, having contracted with a shipowner X to supply coal to his steamers enters into a contract with A, a colliery owner for coal. The coal is expressly stated to be for shipment in X's steamers. A fails to deliver coal to B in time and a ship of X is delayed in consequence. X sues B and claims large damages. B defends the action

ascertained it by reasonable inquiry Z on the strength of A's recommendation entrusts money for investment to Q, who misappropriates it. If A's agreement amounted to a contract he has warranted the use of reasonable diligence in recommending a broker, and the measure of damages in an action by Z against A is the sum entrusted by Z to Q and misappropriated. *De la Bere v Pearson, Ltd* [1903] 1 K B 280, C A (n) ]

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

[Note —Delay in payment of money —Settled law, but treated as anomalous. "The law does not regard collateral or consequential damages arising from delay in the receipt of money." *Per Cur*, *Graham v Campbell* (1878) 7 Ch Div at p 194. As to the liability to pay interest see pp 429-432, below. A gives an *ujara patta* of certain property to B. It is a condition of the *patta* that B should pay to the superior landlord the rent which A was bound to pay to him. B fails to pay the rent. The superior landlord thereupon sues A for the rent, and, in execution of the decree obtained by him in the suit, the tenure is sold. B is not liable to A for the loss of the property, for A could have paid the rent on default by B, and saved the property from sale. *Girish Chandra v Kunja Behari* (1908) 35 Cal 683.]

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B the market price of the first of January and not the profit which would have arisen to B from the sale to C is to be taken into account.

[Note —But a contract to resell at an advanced price is evidence, if not contradicted, of advance of market value. *Engell v Fitch* (1869) L R 1 Q B 659, Ex Ch. The sale was of real estate, and the vendors had failed, not to show title, but to obtain possession which they might have done.]

A contracts to deliver 500 lbs of cotton to B on a fixed day.  
A breaks his contract.  
A is not liable to B.

(n) The doubt of one member of the Court was due to a minor complication in the facts which it is not thought useful to reproduce here.

(q) A contracts to sew handkerchiefs to B, on the first of January certain cloth which B intends to make for sale in case of a particular kind of weather there and make a large profit at that season. The cloth is not delivered until after the appointed time, and it is known to be usual that year in making caps. It is not sold to anyone from A, by way of compensation, the difference between the contract price of the cloth and its market price at that time is very small, but not the profit which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

[Note.—Loss of profits on breach of contract.—*Wilson v. Luce & York P Co* 9 C B N S 632 127 R R 814 followed by the Court of Appeal *Selley & Co v P Co* (1887) 19 Q B Div 70 and approved by the Judicial Committee *Hertlein v. Chicorini Pulp Co* [1911] A C 701 708. The market price means here the price as diminished by the want of demand consequent on the season being past.]

A tailor expecting to make large profits on the occasion of a festival that is to be held at a certain place delivers a sewing machine and a cloth bundle to a railway company to be conveyed to that place, and through the fault of the company's servants they are not delivered until after the conclusion of the festival. The company had no notice of the special purpose for which the goods were required. The tailor is not entitled to damages for the loss of profits nor for his expenses incidental to the journey to that place and back, as such damages could not have been in the contemplation of the parties when they made the contract, nor can they be said to have naturally arisen in the usual course of things from the breach. *Malras Railway Co v. Gouinla Rau* (1899) 21 Mad 172 (o). If the company had known that the tailor wanted to use his goods for profit at the festival it would be liable to him for the estimated loss of profit, and it would not be necessary for him to prove in detail what profit he expected to make. *Simpson v. I & A B R Co* (1876) 1 Q B D 274.]

(r) A passenger contracts with B to convey him from Calcutta to Sydney in a ship sailing on the first of January, and B pays to A by way of deposit one half of his passage money. The ship does not sail on the first of January, and B, after being in consequence detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and in consequence arriving too late in Sydney loses a sum of money. A is liable to repay to B his deposit with interest, and the expense to which he is put by his detention in Calcutta, and the excess if any of the passage money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late (p).

(o) See also *Fatal Habs v. East Indian Rly Co* (1901) 43 All 623 641 C 868

(p) This illustration does not affect the rule as to measure of damages where

[Note—No notice of special circumstances—Here, and in several of the foregoing illustrations, it is assumed that A has no defence to B's action on the contract, and in this illustration it seems to be assumed that A does not know B's particular reason for wanting to be at Sydney by a certain date. A contracts to sell by description to B sulphuric acid commercially free from arsenic. A does not know what B wants the acid for. B receives sulphuric acid from A under the contract, and uses it in producing a kind of sugar used by brewers. The acid is, in fact, not free from arsenic, the sugar manufactured with it is deleterious and useless, and B incurs liability to his customers and the goodwill of his business is diminished in value and other goods of B's are spoilt by being mixed with this acid. B is entitled to recover from A only the price of the acid and the value of the goods spoilt. *Bostock & Co v Nicholson & Sons* [1904] 1 K B 725.]

**Remedy provided by this section not the only remedy for breach of contract**—Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may at his option either sue for the price of the goods or for damages for non-acceptance. The present section prescribes the method of assessing the damages and it does not take away the right of a seller to maintain an action for the price where the property in the goods has passed to the buyer (q). See Sale of Goods Act, 1893 ss 49 and 50.

**Rule in *Hadley v Baxendale***—The illustrations to this section were obviously considered of special importance. We have thought that several of the English and recent Indian decisions would be most usefully dealt with by stating them in the form of additional illustrations and inserting them, distinguished by inclusion within square brackets and by the reference to the report of each case, in the places which seemed most appropriate.

The text of the section is in substance identical with the draft of the Law Commissioners, and so are the illustrations as far as they go, though the number originally proposed was greater. The intention was plainly to affirm the rule of the Common Law as laid down by the

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| the contract is for the sale of goods    | (q) <i>P. P. &amp; Co v Bhagwan Das</i> (1890) |
| <i>Handappa Mudaliar v Muthuswami</i>    | 34 Bom 192 <i>Finlay Muir and Co v</i>         |
| <i>Ayyar</i> (1906) 60 Mal 94 99 I C 601 | <i>Isabhai &amp; Co</i> (1900) 36 Cal 736      |
| <i>A. I. R. 1917 Mal 90</i>              |  |

Court of Exchequer in the leading case of *Hadley v Baxendale*, now more than seventy five years ago. That rule, expressly and carefully framed (r) to be a guide to judges in directing juries was as follows

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract. I or had the special circumstances been known the parties might have specially provided for the breach of contract by special terms as to the damages in that case and of this advantage it would be very unjust to deprive them." (s)

The Court which gave judgment in *Hadley v Baxendale* was a very strong Court, and the rule laid down by it is in harmony with many other rules in our law which fix the measure of liability by the standard of what was known to the defendant or ought to have been then and there known to a reasonable man in his circumstances. As formulated, the rule has two branches. First the party breaking a contract is liable for damages arising "according to the usual course of things", secondly, he is liable or also liable, for "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

(r) See 4 H. & C. 247 143 R. R. 609

(s) *Hadley v Baxendale* (1854) 9 Ex

341 354, 96 R. R. 742 53 (where one

passage is amended in accordance with the report in 23 L. J.)

But, as Lord Birkenhead when a junior at the Bar correctly pointed out, the first branch is in truth only a specification of the simpler cases under the second, for the natural and ordinary consequences of an event—namely, such as can be foreseen without any special information—are always assumed to be in the contemplation of reasonable men and it is no excuse for a man to say that he failed to think reasonably or did not think at all (i). This view seems to be borne out by a remark of Lord Bowen when a member of the Court of Appeal

A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. That is the principle really at the bottom of *Hadley v. Barendale*" (u)

Another eminent Judge proposed a still further simplification. Why need we bring in the consideration of what the parties contemplate? 'In my opinion' he said the parties never contemplate a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract. (1) But with great respect this would not really simplify the matter. For there is no universal definition of what is meant by natural and probable and when we ask what is to be deemed natural and probable in a given case there seems to be no better way of fixing it than by reference to the judgment of a reasonable man having the means of information then and there available. In other words those consequences are natural and probable in a legal sense which the parties in fact contemplate or would as reasonable men contemplate.

There was at one time considerable authority for saying that as to damages which could not be foreseen without information of special circumstances, notice of any such circumstances at the time of entering into the contract would not suffice to make the defendant liable but there must be in effect if not in terms an undertaking to answer for resulting special damage (10). But this view was afterwards distinctly rejected by the Court of Appeal in England. It cannot be said that damages are granted because it is part of the contract that they shall

(t) (1900) L Q R xvi 2<sup>o</sup> 399

(u) *Grébert Porgnis v August* (1885) 15 Q B D 780

(r) Cotton 1 I in *McMahon v. F. H.*  
(1881) - Q. B. Div. at p. 59

(c) Horne v. H. H. I. F. C. (1977)  
I. I. S. C. I. 131 Ex Ch acc especially  
the judgment of B. H. H. I. F. C.  
I. I. S. C. I. 131 Ex Ch acc especially  
the judgment of B. H. H. I. F. C.

be paid, it is the law which imposes or implies the term that upon breach of a contract damages must be paid" (x) Even without this authority the opinion in question could not be entertained in British India, being inconsistent with the plain terms of the section Further discussion of it would, therefore, be useless here (y) See notes to illustrations (h) to (j) above

So far as practicable, "a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly" It is even his duty to take all reasonable steps to mitigate the loss consequent on the breach, and then the effect in actual diminution of the loss he has suffered may be taken into account, and this apart from the question whether it was his duty to act (z) The question must always be whether what was done was a reasonable thing to do, having regard to all the circumstances" and one test is "what a prudent person uninsured," i.e., not having a claim for compensation or indemnity on any one, "would do under the same circumstances" (a) It is not a reasonable thing, for example, to hire a special train to save an hour or so of time when there is no particular reason for being at one's destination at a certain hour, and expense so incurred cannot be recovered as damages (a) If a

(x) *Hydraulic Engineering Co v McHaffie* (1878) 4 Q B Div 670 677, per Cotton LJ The party does not enter into a kind of second contract to pay damages Bramwell LJ at p 674

An agreement to pay damages does not form part of the contract Brett LJ at p 676 This is confirmed by *Hammond & Co v Bussey* (1887) 20 Q B Div 79 see especially per Bowen LJ at p 97, and the later case of *Aguis v Great Western Colliery Co* [1899] 1 Q B 413 assumes the opposite opinion to be untenable The learned editors of *Mayne on Damages*, in which book the theory of an auxiliary contract to pay special damages appears to have been first propounded, do not seem to us to have succeeded in explaining away these decided and unanimous utterances, neither do the learned editors of *Smith's Leading Cases* (notes to *Lucas v Hall*

cocks in vol II)

(y) In *Keshavlal Brothers & Co v Dwanchand & Co* (1923) 50 I A 142, 152, 47 Bom 563 74 I C 306 A I R 1923 P C 105 the dicta now cited seem not to have been before Lord Atkinson when, delivering the judgment of the Judicial Committee, he said

The authorities in England seem to go to the length of holding that notice to C of the special purpose for which A requires the goods is not enough, that to make C liable for the additional damage he must have, expressly or implied contracted to run the additional risk citing (*Horne v Midland Ry Co* (1874) L R 8 C P 131) note (w) above

(z) *British Westinghouse, & Co. v. Underground Electric, & Co* [1912] A C 673, see per Lord Haldane at p. 672.

(a) *Le Blanche v L. & N. W. P Co* (1876) 1 C P D v 286, per James LJ at

buyer disappointed of his goods can buy in the market at a sum equal to or less than the contract price, he has suffered no loss and can recover nothing (under English law merely nominal damages) (b)

In England the Sale of Goods Act, 1893 (c), provides as follows —

“(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non delivery

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract

“(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of goods at the time or times when they ought to have been delivered (d), or, if no time was fixed, then at the time of the refusal to deliver ”

S 57 of the Indian Sale of Goods Act follows sub s (1) of the section now quoted, but does not add to or amend s 73 of the Contract Act. The other sub sections, though not of positive authority in British India may be useful as a compendious and well considered statement of the existing rule

As to the difference between contract and market price, it may be regarded as an application of the principle last stated as to the disappointed party's right to fulfil the contract himself at the defaulting party's cost, so far as it can reasonably be done — and on this very principle the rule is not literally applied in the case of an anticipatory breach by repudiation of the contract (e)

In the absence of any more specific rule applicable to the case, damages for the breach of a contract to perform any specified work are to be “ assessed at the pecuniary amount of the difference between the

p 309, and Mellish L J at p 313, approved by Jud Comm in *Erie County Natural Gas &c Co v Carroll* [1911] A C 105

(b) *Erie County &c Co's Case* last note

(c) Sect 50

(d) In India also the date of breach is the material date, a seller who holds on

after the buyer's default can recover no further loss nor is he liable to allow for improvement due to later change in the market price. *Jamal v Moolla Darood Sons & Co* [1916] 1 A C 175 43 I A 631 I C 949

(e) *Millett v Ian Heek & Co* [1921] 2 K B 369 C A, *sup* pp 290 291, above

state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed—not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculation may be the same (*f*)

Matters of external and collateral compensation, as by insurance (*g*) or by an access of profit to some only of plaintiffs suing jointly in another transaction which but for the breach of contract would not have taken place (*h*), or through a new contract with a third person (*i*), are not taken into account for the purpose of reducing damages. The explanation to the present section does not appear to contradict this rule. The article on Damages by the late Blake Odgers K C, in the *Encyclopædia of the Laws of England* may be referred to as giving a learned and careful summary of the whole subject down to its date, 1907, 2nd ed. We may add that the English rules appear to have been adopted in jurisdictions under the British flag but under systems of law differing generally from the Common Law and from one another.

**Explanation to s 73** “means which existed,” etc.—This explanation has caused considerable difficulty in practice—the words “means which existed of remedying the inconvenience” have seemed obscure. No similar words are known to occur in English authorities—but the framers of the Act appear to have had in view the class of cases where as we have just seen (*j*), the damages recoverable for consequential expenses are limited by the test of what a prudent man might have reasonably done if the whole expense was to fall on himself. The words are also sufficient to cover the case of a party who omits to take natural and obvious means of diminishing the loss incurred by the other party’s failure to perform his contract. It seems on principle

(*f*) *Hugsell v School for Indigent Blind* (1882) 8 Q B Div 357, 364 following *Robinson v Harman* (1848) 1 Ex 855. Finch Sel Ca 753 and *Lock v Furze* (1866) L R 1 C P 441. But there is a special rule as to covenants to repair. See p 409 below.

(*g*) *Bradburn v G W R Co* (1874) L R 10 Ex 1.

(*h*) *Jehsen v E & W India Dock Co* (1875) L R 10 C P 300.

(*i*) *Joyner v Weeks* [1891] 2 Q B

31 C A. *Williams Bros v Ed T Agius* [1914] A C 510 where the House of Lords conclusively settled the rule. It is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price. Lord Moulton at pp 530 531.

(*j*) Pp 419 420 above.

that in such a case consequential damage which might have been avoided by the exercise of common intelligence and prudence is not recoverable, thus, if one has to replace goods that have not been delivered in time, and has recklessly or stupidly bought them at an excessive price, the seller in default remains chargeable only with the difference between the contract and the normal market price and default in building a wall does not entitle the promisee to stand by doing nothing and then recover for loss which he might have prevented by reasonable diligence (k) The rule must, of course be applied with discretion, a man who has already put himself in the wrong by breaking his contract has no right to impose new and extraordinary duties on the aggrieved party That party can be expected only to use ordinary and reasonable diligence much less can he be expected to warrant success where the result of diligent endeavour is in its nature doubtful

In this connection may be noted the observations of the Judicial Committee in *Jamal v Moolla Dawood Sons & Co* (l) It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect (m) But the loss to be ascertained is the loss at the date of the breach If at that date the plaintiff could do something or did something which mitigated the damage the defendant is entitled to the benefit of it *Stamforth v Tyall* (n) is an illustration of this But the fact that by reason of the loss of the contract which this defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the later contract In *Jamal's Case* the plaintiff sold return shares to the defendant to be delivered on or before 30th December 1911 The shares were tendered on 30th December but the defendant declined to take delivery or pay for them The difference between the contract price and the market price on 30th December that is the date of the breach amounted to Rs 109 21s Between 28th February 1912 and August 1912 the plaintiff sold the shares in a rising market

(k) *Firmir v Shankar Dutt* (1908) Cal 493 500 71 I C 919

(l) 108 I C 473 (the case before us is not to the level of remoteness of damage as proposed)

(m) Recent example *Arjun & Harman v Secretary of State* (1941) 85 I C 200 A I P 19 Cal 73

(n) (1870) 7 Blac 109

thus realising more than if he had sold on 30th December, 1911, namely, a sum only of Rs 79 862 less than the contract price. In March 1912, the plaintiff sued the defendant on the contract, claiming Rs 1,09 218. The defendant contended that he was entitled to the benefit of the prices actually obtained in mitigation of damages and the plaintiff was only entitled to recover Rs 79 862. This contention was successful in the Chief Court of Lower Burma. But on appeal the Judicial Committee held that the measure of damages was the difference between the contract price and the market price *at the date of the breach*. If the seller retains the shares after the breach the speculation as to the way the market will subsequently go is the speculation of the seller not of the buyer. The seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls nor is he liable to the purchaser for the profit if the market rises. (o)

A agrees to let his house to B at a certain rent. B refuses to take the house and A sues B for damages. The Chief Court of the Punjab is reported to have held that the measure of damages is the loss of rent suffered by A after deducting such sum as A could recover from another person by way of rent by making reasonable efforts to secure another tenant (p). We do not think the Court can have intended to lay down this or any like general proposition. Reasonable efforts to secure a tenant do not produce any rent until an actual tenant is found and the interval may be considerable. The probability of such effort succeeding within a reasonable time must obviously depend on local and often on temporary circumstances.

At the beginning of the cotton season A, a cotton merchant and Z, a millowner agree that during six months Z shall put his mill at A's disposal at a fixed rate in order to gin cotton which A contemplates buying and on his part agrees to procure and supply to the mill. Before A has supplied any cotton and without any unreasonable delay on his part, Z repudiates the contract. A is entitled to recover damages from Z for his estimated loss of profit. He is not bound to buy and tender to Z's mill cotton which he knows would be refused (q).

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(o) 43 I A at p 10. 43 Cal at p 50. *Bhat a* (1908) 50 Cal 1048. L P 50 I A.  
 (p) *Lachmi Narain v Vernon* (1906) 299 (P C) 111 I C 480. A I R 1908  
 Punj Rec no 13.  
 (q) *Pangopal v Dhanya Jadhav*

**Contracts relating to immovable property**—It is commonly said that where a person sustains loss by reason of a breach of contract he is *prima facie* entitled so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed (r), though as we have seen, this form of statement is open to some misunderstanding (s). Now this rule does not apply in English law to contracts for the purchase of immovable property. It was finally settled by the decision of the House of Lords in *Bain v Fothergill* (t) that a purchaser of real estate cannot recover damages for the loss of his bargain but only his deposit and expenses, and that even if the vendor knew that he had no title nor any means of acquiring it the purchaser may have a further remedy by an action for deceit but not on the contract. The reason for this exceptional rule is that the purchaser of real estate in England must expect some degree of uncertainty as to whether a good title can be effectively made by the vendor, whereas the vendor of a chattel must know or at all events is taken to know, what his right to the chattel is (u).

The special rule does not, however, apply to the case of wilful default in giving possession (v) nor to an express covenant for quiet enjoyment in an executed conveyance (u) nor to an executory agreement to make a title by a party who appears on the face of the agreement not to have any title at its date (x) nor is it seems to unreasonable omission to complete the title by taking some definite step in the vendor's power, such as applying for the lessor's consent to an assign

(r) *Robinson v Harman* (1848) 1 Ex 805

(s) P 421 above

(t) (1874) L R 7 H L 158

(u) In the United States where registry of title or of assurances in some form is universal the reason is generally held not to exist and the rule therefore not accepted. Sedgwick Elements of Damages *ad fin*.

(v) *Engell v Fitch* 1 ex Ch (1869) L R 4 Q B 659 (as to the authority of this case see *per Byrne J* [1902] 1 Ch at p 195). *Jagges v Millar* (1877) 6 Ch D 153. *Foyal Bristol Permanent Building Society v Bomash* (1887) 35 Ch D 390. Similarly where the vendor

was tempted by a higher offer to sell the property to a third person in breach of his contract the measure of damages was the difference between the price the plaintiff agreed to pay and the price the defendant received. *Radha Krishan Kaul v Shankar Das* 100 I C 402. 1 I R 1927 Lah 252.

(w) *Lock v Furre* 1 ex Ch (1866) 1 R 1 C P 441.

(x) *Wall v City of London R P Co* (1874) L R 9 Q B 219. The Court thought the case so clear that they did not delay judgment to see the result of *Bain v Fothergill* (above) then pending in the House of Lords. see 1 R 9 Q B at p 352.

ment (y), nor to damages caused not by defect of title or any real difficulty of conveyancing, but by the vendor's want of reasonable diligence in completing (z)

The rule in *Bain v Fothergill* was at one time assumed in the High Court of Bombay to be the law of British India. A purchaser claimed to recover damages for the loss of his bargain, and the Court disallowed his claim on the ground that the vendor had offered to do all that lay in her power to carry out her contract (a). No reference was made to the Contract Act, but the argument turned on the question whether the case came under the rule in *Bain v Fothergill* or the exception in *Engell v Fitch* (b). The assumption so made by counsel and the Court was, it is submitted, erroneous. Sec 73 is general in its terms and does not exclude the case of damages for breach of a contract to sell immovable property (c) and in fact the rule was not settled beyond question in England when the Act was passed. "The Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities" (d). Where therefore a purchaser of land claims damages for the loss of his bargain the question to be decided is whether the damage alleged to have been caused to him naturally arose in the usual course of things from such breach and in an ordinary case it would be difficult to hold other

wise

Even apart from the Act, the English rule is treated in its own jurisdiction as anomalous, and justified only by the peculiar conditions of English titles and conveyancing. It would therefore seem very doubtful whether, on the general principle of justice equity, and good conscience," it was ever applicable in British India. The view propounded above was approved by the High Court of Bombay in

(y) *Day v Singleton* [1899] 2 Ch 320, C A, where however, on the view taken by the Court of the facts the default was wilful

(z) *Jones v Gardiner* [1902] 1 Ch 191

(a) *Pilamber v Cassinai* (1886) 11 Bom 272. It is by no means clear that on its own ground the decision was correct. In England we should not ascribe much diligence, not to say good faith to a

vendor of a mortgaged house who professed not to know where the title-deeds were and made no inquiry of the mortgagee

(b) Note (r) last page

(c) It is remarkable that none of the illustrations to the section relate to contracts for the sale of land

(d) Per Farran C.J. in *Vagardas v Ahmedkhan* (1895) 21 Bom 175, 185

*Ranchhod v. Manmohandas* (e) The case was however one of wilful default on the part of the vendor in completing the title and it was held following *Day v. Singleton* (f) that the purchaser was entitled to recover not only the deposit with interest and expenses but the loss of his bargain. At the same time the Court expressed the opinion that the rule in *Bain v. Fothergill* (g) was not law in this country. As section 73 imposes no exception on the ordinary law as to damage whatever the subject matter of the contract it seems to me that in cases of breach of contract for sale of an immovable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages (h). A similar view has been expressed by the High Courts of Calcutta (i) and of Lahore (j). Like wise the Full Bench of the Madras High Court (k) has held that a manager of a joint Hindu family who has agreed to sell immovable property belonging to himself and the minor members of the family is personally liable under this section for damages for failure to perform the contract when it is found that it is not binding on the minors there being no necessity for the sale. It was also held that this liability was not affected by the fact that there was no misrepresentation on the part of the manager as to the necessity for sale nor by the fact that the purchaser knew that he was buying from a manager of a joint family which comprised minors and that the Court may refuse specific performance against the minors (l). Where a vendor of land guarantees his title to the purchaser and the latter is evicted from his holding he is entitled to recover the value of the land at the date of eviction and not merely the purchase money paid for it (m). But in special

(e) (1907) 32 Bom 160

(f) [1899] 2 Ch 390 C A See note

(g) last page

(h) (1874) L R 11 H L 158

(i) 111 Ind. 153 Bom 163 171

There may be cases where it is an implied contract that a vendor whose title proves defective without any default of his own shall be liable only for expenses. *Tallabhdas v. Nagaraj* (1911) 33 Bom 11 R 1213 O. I C 143 In practical cases assessment of damages for a defective title may

have to be rough see *Har Lal Dals Khram v. Mulchand* (1908) 5 Bom 883 113 I C 27 A I R 11 8 Bom 497

(j) *Abinchantra v. Keshna* (1911) 39 Cal 48 at p 460

(k) *Jas. K. Menon Das v. J. S. I. R. v. Th. Sibha* (1900) 1 Lal 380 19 I C 1

(l) *111 Ind. 153 Bom 163 171* (1918) 40 Mal 335 39 I C 708

(m) And see note (h)

(n) *Nagardas v. Ahm. Khan* (1895) 21 Bom 17 In view of this opinion

circumstances, where the buyer in effect had notice of difficulties arising from an adverse claim, the High Court of Bombay held him not entitled to recover damages for loss of profit on a contract to re sell at an advanced price (n) Similarly as to a vendor who has caused or materially contributed to the loss by his own fault, such as delay in answering requisitions (o)

Where a lessee's covenant to deliver up the premises in good repair is broken at the end of the term, the measure of damages would on strict principle be the amount by which the value of the reversion is diminished, but the difficulty and inconvenience of this calculation have led to the adoption, as the practical measure in such cases, of the reasonable cost of putting the premises into the state of repair in which they ought to have been left (p) In the case of a breach during the term the measure is, according to the more general standard, the diminution in the value of the reversion, and where the covenant is in a sub lease expressed to be such, the intermediate lessor's liability to the superior lessor on the covenants in the original lease will be taken into account for this purpose (q)

As to liability for loss of, or damage to, property delivered to common carriers, see Act III of 1865, and as to the liability of a railway company, see Act IX of 1890

**Interest by way of damages**—Act XXXII of 1839 provides for the payment of interest by way of damages in certain cases (r) Under

current of authority the failure of an attempt to dispute it in *Sind Ramsingh Kundansingh v. Sajan Damsi* (1927) 101 I C 704, A I R 1927 Sind 120 was hardly worth recording

(n) *Dhanrajgirji Narsinggirji v. Tata Sons*, 49 Bom 1, 26 B L R 838 92 I C 225, A I R 1924 Bom 473

(o) *Shamsudin Tajbhai v. Dahyabhai Maganlal* (1923) 48 Bom 368, 84 I C 947 A I R 1924 Bom 357 Such cases do not affect the general rule, e g, *Parma Nand v. Ghulam Hussain Shah* 116 I C 449, A I R 1929 Lah 416

(p) *Joyner v. Wells* [1891] 2 Q B 31, C A

(q) *Conquest v. Elbetts* [1896] A C 400

(r) The Act consists of a single section

which runs as follows —

Whereas it is expedient to extend to the territories under the government of the East India Company, as well within the jurisdiction of Her Majesty's Courts as elsewhere, the provisions of the statute 3rd and 4th William IV chapter 42, section 28 and concerning the allowance of interest in certain cases

It is therefore hereby enacted that upon all debts or sums certain payable at a certain time or otherwise the Court before which such debts or sums may be recovered may if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or

that Act the Court may allow interest on debts or sums certain which are payable by an instrument in writing from the time when the amount becomes payable where a time is fixed for payment, or, where no time is fixed, from that date on which demand of payment is made in writing giving notice to the debtor that interest will be claimed. The question arose in a Madras case (s) whether interest could be recovered by way of damages under the present section (illustration (n)) where it was not recoverable under the Interest Act, and it was held that it could not be so recovered. The effect of the judgment in that case is that wherever interest could be claimed by way of damages—and illustration (n) is an instance of such a case—it should not be awarded unless either the requirements of the Interest Act are complied with or interest is recoverable at Common Law.

In an Allahabad case (t) decided a year earlier the plaintiff sued the defendant as lessee (*thekadar*) of a village for arrears of rent together with interest, and it was held that, though under the N W P Rent Act (u) the defendant was not liable to pay interest on the arrears he was chargeable with interest under s. 73 of the Contract Act. In the course of a very brief judgment the Court (v) said —“Illustration (n) of s. 73 shows that where a person breaks his contract to pay another a sum of money on a certain specified day he is liable for the principal sum due, together with interest up to the day of payment. As to this decision it may be observed that no interest ought to have been allowed up to the date of the suit (w) as the provisions of the Rent Act which applied to the parties expressly exempted *thekadars* from liability for such interest. On the point now before us the decision is directly opposed to that of the Madras Court. No reference was made

sums be payable by virtue of some written instrument at a certain time or if payable otherwise then from the time when demand of payment shall have been made in writing so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment provided that interest shall be payable in all cases in which it is now payable by law.”

It follows Lord Tenterden's Act passed in England a few years earlier (3 & 4 Will IV c. 42 s. 28) as to which see

*L. C. & D. P. Co. v. S. E. R. Co.* (1893) 1 C. 429

(s) *Kamalam aly Ieeru Meera Laxmi* (1897) 90 M. L. J. 131

(t) *Ghanshyam Singh v. Daulat Singh* (1896) 18 All. 240. See also *Ghanshyam Singh v. Daulat Singh* (1896) All. W. N. 55

(u) Act VII of 1881 s. 31 Explanation

(v) Consists of 11 C. J. and Aikman J.

(w) As to interest after suit see s. 34 of the Code of Civil Procedure 1908

to the Interest Act, and it does not appear from the report that the case came within that Act

The Madras decision has been followed by the Chief Court of the Punjab (x) but dissented from by the High Court of Calcutta According to the Calcutta Court, interest may be awarded as damages for wrongful detention of money under the present section, though there may be no agreement to pay interest and though the case may not be covered by the Interest Act (y) This goes, indeed, beyond the English Common Law Sec 73 is merely declaratory of the Common Law as to damages (z), and no interest is allowed at Common Law by way of damages for mere wrongful detention of money

The rule of English Common Law, and therefore presumably of British India apart from the Interest Act, is "that interest is not due on money secured ' even " by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments " (a) " At common law interest was not payable on ordinary debts, unless by agreement or by mercantile usage, nor could damages be given for non payment of such debts " (b) There does not seem to be any sufficient ground for reading into illustration (n) to the present section an intention to abolish this rule and supersede the Act of 1839 Indeed, the illustration does not say that the defendant is necessarily liable to pay interest but only assumes that he may be so under the Act of 1839 or otherwise, and says that he is not in any event liable for more

(x) *Bura v. Mulla Shah* (1901) Punj Rec no 104 *Aryan Das v. Hakim Lal* (1913) Punj Rec no 39, 154

(y) *Akhetra Mohan v. Nishi Kumar* (1917) 22 C W N 498, *Mahamaya Prasad v. Ram Akelawan* (1911) 15 Cal L J 684, 687, *Anrudh Kumar v. Lachhmi Chand* (1928) 50 All 818, 115 I C 114, A I R 1928 All 500, but see *Jucala Prasad v. Holi Lal* (1924) 46 All 625, 79 I C 1049, *Ismail Hasan v. Mehdi Hasan*, 46 All 897, 80 I C 63 In *Surja Narain v. Pratab Narain* (1899) 26 Cal 955, 964-965, Banerjee J was inclined to the view that interest cannot be claimed by way of damages

under s 73 in every case of detention of money but only when actual loss was proved, as where the creditor has to borrow money at interest from others on default in payment by the debtor

(z) *Jamal v. Moolla Dawood Sons & Co* (1916) L R 43 I A 6, 11, 43 Cal 493, 503 31 I C 949

(a) *Page v. Neuman* (1829) 9 B & C 378 381, 33 R R 204, 206, and see the English authorities reviewed by Lord Herschell, *L C & D R Co v S F R Co* [1893] A C 429 437 879

(b) *Indley L J, S C in C A* [1892] 1 Ch at p 140

But in the case of breach of a contract of sale the Court may now award interest to a seller suing for the price and to a buyer suing for refund Act III of 1930, s 61 (c)

**Breach of promise of marriage**—The analogy of the latitude allowed in England in assessing damages for breach of a contract to marry is not applicable to the breach of a promise made by the father of a Mahomedan girl to give her in marriage All that the plaintiff is entitled to as against the father is the return of ornaments, clothes and other presents made by the plaintiff to the girl The right to recover these is recognised by the Mahomedan law Apart from that law the presents may be recovered under either s 65 or this section (d)

**The section applies only where a contract has been broken**—This would seem to need no proof or even statement, yet judicial affirmation of it has been necessary A toll contractor who suffers loss in his income by reason of the discontinuance of the traffic, owing to plague regulations made by Government consequent upon the outbreak of plague in the locality has no cause of action against the Government to recover damages as on a breach of contract (e) There is no breach of contract involved in making the regulations, and one may add that such an action would not have been possible in any Western country We fail to see how the pleader can have seriously thought he could make out a contract either actual or constructive between the plaintiff and the Government

74.—When a contract has been broken, if a sum is

named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty,

Compensation for breach of contract where penalty stipulated for

the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation (f) not exceeding the

(c) As to the former Indian law, see *Handappa (or Pamalinga) Midalar v Muthuswami Ayyar* (1923) 50 Mad 91, 99 I C 609 A I R 1927 Ma I 99

(d) *Abdul Faal v Mahomed Hussien* (1918) 42 Bom 499 38 I C. 771

(e) *Secretary of State v Abdul Jahim*

(1909) 4 Bom L R 874 The suggestion of an implied warranty to maintain the existing amount of traffic is the least absurd way of putting the claim but absurd still

(f) This section does not overlap or extend s 73 there must be a stipulation

amount so named *or, as the case may be, the penalty stipulated for.*

*Explanation.*—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

*Exception.*—When any person enters into any bail-bond, recognisance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Government of India or of any local Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

*Explanation.*—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

#### Illustrations

(a) A contracts with B to pay B Rs 1,000 if he fails to pay B Rs 500 on a given day. A fails to pay B Rs 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs 5,000, as the Court considers reasonable.

(c) A gives a recognisance binding him in a penalty of Rs 500 to appear in Court on a certain day. He forfeits his recognisance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of Rs 1,000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Rs 1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. The stipulation is not by way of penalty, and the contract may be enforced according to its terms (7).

in the nature of a penalty. *Meyyappa Chetty v. Nachammal Achi*, 123 I C 343, A. I. R. 1929 Mad 743, is unintelligible as reported.

(7) This illustration really covers *Sher Prasad v. Samsulal*, All L. J. (1929) 894, 115 I C. 639; A. I. R. 1929 All 556, rightly decided on common

(g) A borrows Rs 100 from B, and gives him a bond for Rs 200, payable by five yearly instalments of Rs 40, with a stipulation that in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty (h)

**Penalty and liquidated damages.**—This section boldly cuts the most troublesome knot in the Common Law doctrine of damages. By the Common Law parties may name a penal sum as due and payable on a breach of contract, that sum being, according to the true intention of the parties, only a maximum of damages. In that case the real damages, and no more, are recoverable. On the other hand, they may by consent assess a fixed measure of damages, liquidated damages as they are called, to avoid the difficulty that must often be found in setting a pecuniary value on obligations not referable, on the face of them, to any commercial standard. So far this looks very well. The trouble is that even now the Courts have not arrived at clear or certain rules for deciding to which of these two classes a given stipulation for a penal or seemingly penal sum belongs. The only thing that is quite certain is that the use of the words “penalty” or “liquidated damages” is not decisive, and that even the addition of negative words purporting to exclude the other alternative, for example “as liquidated damages and not as a penalty” (i), will not make it so. Two causes appear to have conspired to produce this anomalous result: a well meant but perhaps not wholly well informed endeavour to imitate the equitable doctrine of giving relief against forfeiture (j) and, reinforcing this, a logical or arithmetical repugnance of the Common Law (perhaps connected with the canonical prohibition of usury (k)) to admit that a greater sum of money can ever be due for the breach of an obligation to pay a smaller one. “That a very large sum should become immediately payable in consequence of the non payment of a very

sense, and *Jenna Talayya v Kalarla Gangayya*, 105 I C 789, A I R 1927 Mad 965

(h) So as to a similar clause in a “chit fund” bond *Ramalinga Adavar v Meenakshivundaram* (1924) 47 Mad I 1 833, 85 I C 261, A I R 1925 Mad 177, *Subbiah Pillai v Shanmugham Iyalar* (1928) 108 I C 310, A I R 1928 Mad 245.

(i) In *Kenble v Farren* (1829) 6 Bing

141, 31 R R 366 a sum expressly declared by the parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof was held to be a penalty.

(j) See per Jessel M R *Wallis v Smith* (1892) 21 (1) D 217 - 6

(k) It must be remembered that in the Middle Ages and even later usury meant not taking exorbitant interest, but taking interest at all.

small sum and that the former should not be considered as a penalty, appears to be a contradiction in terms (l) Accordingly a conventional larger sum agreed upon as payable in the event of failure to pay a smaller sum or in such an event among others is treated as penal only Further it is understood that where a sum is made payable by a contract to secure performance of several stipulations the damages for the breach of which respectively must be substantially different that sum is *prima facie* to be regarded as a penalty and not as liquidated damages (m) The truth is that here as in some other branches of the law what once was a rule of policy overriding the intention of the parties has been turned into an artificial and more or less arbitrary rule of construction The nearest approximation to a general test yet arrived at is that so called liquidated damages will not be recoverable in full when the Court thinks this would be extravagant or unconscionable, having regard to the circumstances of the particular case (n) But it is quite needless to enter in this place upon the somewhat confusing application of the resulting distinctions for the manifest purpose of the present section is to get rid of all these questions by carrying out the tendency of the English authorities to its full consequences (o)

There may again be a conventional sum which is neither damages nor penalty but as it has been called a liquidated satisfaction (p) the agreed price of liberty to do or omit something In such a case there is merely a conditional or alternative promise which if not open to any other objection will take effect according to its terms This section does not enable the Court to modify a decree (q)

**Amendment**—There is no doubt that as the section originally stood it was intended to do away with the distinction between a penalty and liquidated damages (r) The sole object of the section

(l) *Kemble v. Farren* 6 Bng at p 148 449 11 I C 48 A I R 19 J  
( ) A I Smith I J *Wid on v. Loe* I C 179 All I J (1) 9) 791  
[1836] 1 Q B 676 631

(n) *Clydebank Engineering Co v. Castane la* [1905] A C 5 (an appeal from Scotland but the Scottish law does not differ on this point from the English)  
*Webster v. Bosanquet* [1912] A C 394

(Jul Comm from Ceylon)  
(o) That it is not finally settled in *Janna Singh v. Arjan Singh* 33 C W N  
(p) See *Lord Fitzroy v. Mo Kl nd Iron and Coal Co* (1886) 11 App Ca at p 347

(q) *Raghunandan Prasad v. Ghulam Ala ud d n Beg* (1904) 46 All 571 79 I C 916  
(r) *MacIntosh v. Crow* (1883) 9 Cal 689 697 per Wilson J *Eng les car t Putter v. Chatu Achen* (1881) 3 Mad 204

appears to have been to provide for the class of cases to which *Aemble v Farren* (s) belongs, and in which the distinction between 'liquidated damages' and 'penalty' has given rise to so much difference of opinion in the English Courts" (t). It does not apply to covenants in a lease of which the breach involves forfeiture (u). The first paragraph and the explanation following it were substituted for the paragraph as originally enacted by the Indian Contract Act Amendment Act VI of 1899, s. 1. The italicised words indicate the portion newly added in the section. Illustrations (d), (e) (f) and (g) were also inserted by the same Act. The marginal note to the section has also been altered, it originally stood thus "Title to compensation for breach of contract in which a sum is named as payable in case of breach."

The first section of the Amendment Act provides that it shall come into force on the first day of May, 1899, and that it shall apply to "every contract in respect of which any suit is instituted or which is put in issue in any suit after the aforesaid date." These words gave rise to conflicting opinions on the question whether the revised section did or did not apply to contracts put in issue after the appointed date in suits instituted before it there were judgments of the Madras High Court in the negative (v) and of the Allahabad High Court in the affirmative (w). We prefer the opinion of the Madras Court, but lapse of time has made the difference immaterial.

The first paragraph of the section stood as follows before the amendment —  
"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named."

**Stipulations for interest (2).**—By far the largest number of cases decided under the original paragraph related to stipulations providing

228, *The Brahmaputra Tea Co., Ltd v Searth* (1885) 11 Cal 545 550, *Deno Nath v Vibaran Chandra* (1899) 27 Cal 421, 423, *Nail Ram v Shih Dal* (1882) 5 All 238 241, *Dilbar Sarkar v Jajori Kurmi* (1898) 3 C W N 43 15. It is said to be a common error to suppose the operation of this section to be confined to unreasonable agreements, as obviously it is not *Jagannath v Ishnu* (1926) 96 I C 382, A I R 1927 Nag 284.

(s) 6 Binn 141.

(t) Per Sargent C.J. in *Imarkhan v*

*Salekhan* (1893) 17 Bom 106, 111.

(u) *Krishna Shetty v Gilbert Pinte* (1919) 42 Mad 654 30 I C 834.

(v) *Sarkar v Sarkar* (1901) 23 M L J 343 345. *Channa v Pilla* (1902) 26 M L J 445.

(w) *Brj Bhukhan v Sait ul-din* (1902) 23 All 163.

(2) The *desha* clause usual in mortgages in Outh. for payment of an increased principal sum for redemption wholly or in part in lieu of interest is not penal. *Lal v Hara Jai Breen* 1901 I C 534, A I R 1926 Outh 502.

## INTEREST BY WAY OF PENALTY.

for interest Those stipulations may be divided into the following five classes —

I Stipulations for payment of interest at a higher rate on default on the part of the debtor to pay the principal or part thereof or interest on the due date, and these may again be subdivided into

(a) Stipulations for payment of enhanced interest from the *date of the bond*, and

(b) Those for payment of such interest from the *date of default*,

II Stipulations for payment on default of compound interest which may be divided into

(a) Stipulations for payment of compound interest at the same rate as simple interest, and

(b) Those for payment of compound interest at a rate higher than simple interest, or for payment of an increased rate of interest and compound interest at that rate,

III Stipulations for payment of interest at a specified rate if the principal or a part thereof is not paid on the due date

IV Stipulations for payment of interest at a lower rate if interest paid on due dates,

V Stipulations for payment of interest from the date of the bond, but at an exorbitant rate

There has been considerable conflict in the decisions of the several High Courts on the section in its original form, especially as regards stipulations comprised in Class I That section applied only to contracts in which a sum was *named* as the amount to be paid in case of the breach thereof, and the conflict arose owing to different interpretations put upon the expression "named" The section has been amended to put an end to the divergent views taken by the Courts, and is now "amplified so as to make it apply in terms to all stipulations by way of penalty, whether the penalty consists of a sum named or not" (y)

The stipulations comprised in the above classes and the effect of the amendment are considered below :—

I **Stipulations for enhanced rate of interest.**—Such a stipulation occurring in a contract may be of a twofold character. (1) it may either provide for payment of interest at an increased rate from the *date of the*

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(y) See Bombay Government Gazette, 1898, Part VI., p. 36 (Statement of Objects and Reasons)

*contract on failure of the debtor to pay on the due date the interest or principal or an instalment of principal, or (2) it may provide for payment at a higher rate from the date of default only* Thus if A borrows Rs 1,000 from B on 1st June, 1902, A may give a bond to B for the repayment of the loan on 1st June 1903, with interest at 12 per cent per annum, with a stipulation either that in case of default interest shall be payable at the rate of 25 per cent from the date of the bond, namely 1st June 1902, or from the date of default, namely, 1st June, 1903 In the former case it has been held that the stipulation *always* (2) amounts to a penalty and the provisions of s 74 apply, so that the Court may relieve the debtor, and award only such compensation to the creditor as it considers reasonable (a) In the latter case, where the increased rate of interest is stipulated to have operation only from the date of default, the provision has not generally been regarded as a penalty (b) The section as it stood before the amendment required as one essential condition that there should be 'a sum named in the contract as the amount to be paid in case of breach' Where the stipulation for the higher rate of interest is to operate from the date of the bond, there is invariably in such a case "a sum named in the contract as the amount to be paid in case of breach" Thus in

(2) The leading case on the subject is *Mackintosh v Crow* (1883) 9 Cal 689 The result of the cases will be found summarised in *Umarkhan v Salekhan* (1892) 17 Bom 106, 113, 114, and in *Abdul Gani v Aandlal* (1902) 30 Cal 15 17 In the former case it is stated that a stipulation for a higher rate of interest is generally "a penalty, in the latter that it has always been held as a penalty. The current of decisions justifies the use of the latter expression

(a) *Muthura Persad v Luggun Koor* (1883) 9 Cal 615, *Sungut Lal v Baijnath Roy* (1886) 13 Cal 164, *Kaluchand Kyal v Shyab Chunder* (1892) 19 Cal 392 *Rameshwar Prosad Singh v. Ras Sham Krishen* (1901) 20 Cal 43, 50, *Srijay v Maruti* (1889) 14 Bom 274, *Trimbal v Bhagchand* (1902) 27 Bom 21, *Jengadeswarra v Chalu Achen* (1881) 3 Mad 224, *Eythilinga v Sundarappa* (1882) 6 Mad 167; *Nanjappa v Nanjappa* (1888) 12

Mad 161, *Gopaludu v Venkataratnam* (1894) 18 Mad 175, *Khurram Singh v Bhauani Bakhsh* (1881) 3 All 440, *Kharag Singh v Bhola Nath* (1881) 4 All 8, *Narain Das v Chait Ram* (1884) 6 All 179 See also *Rasaji v Sayana* (1869) 6 B H C A C 7, *Bichool Nath v Ram Lochun* (1873) 11 B L R 135, *Sunder Koer v Ras Sham Krishen* (1907) 34 Cal 150, 157, L R 34 I A 9

(b) *Mackintosh v Hunt* (1877) 2 Cal 202, *Mackintosh v Crow* (1883) 9 Cal 689, *Dena Nath v Asbaran Chantaru* (1899) 27 Cal 421, 425, *Abdul Gani v Aandlal* (1902) 30 Cal 15, *Dullabh deo v Lakshmandas* (1889) 14 Bom 200, *Umarkhan v Salekhan* (1892) 17 Bom 106 *Sayana Ram v Rigunadham* (1886) 9 Mad 276, *Pennasami Thallavar v Subramanian Aari* (1901) 14 Mad 1, J 136, *Tel Chind v Morice* (1877) Punj Rec no 5, *Honda Mal v Muham mad Bala* (1879) Punj Rec no 61

the illustration given above A would be liable on default to pay B Rs 1,250, though, if he repaid the loan on the due date, the principal with interest would have amounted to Rs 1,120 only. But no such sum can be said to be named in the contract, where the increased rate is to commence from the date of default, for "at the moment of the breach no larger sum can be exacted by the creditor. The distinction between the two classes of cases was thus stated by the Madras High Court —

' By the cases in this country it is well established that an agreement to pay a sum of money on a given day with interest at a certain rate with a stipulation that in default the debtor shall *thenceforward* pay a higher rate of interest, is strictly enforceable. In such an agreement no question of penalty arises, because it imposes an (bb) obligation on the debtor to pay a larger sum than what was originally due. In the words of s 71 of the Contract Act no sum is named as the amount to be paid in case of such breach. At the moment of the breach no larger sum can be exacted by the creditor but from that date the terms on which the debtor holds the money become less favourable. By the default he accepts the alternative arrangement of paying a higher rate of interest for the future. On the other hand where the stipulation is that on default the higher rate shall be payable from the *date of the original obligation*, the debtor does on default become immediately liable for a larger sum, viz., the difference between the enhanced and the original rate of interest already due. (c)

It has been stated above that a stipulation for an increased rate of interest from the *date of default* is not generally a penalty but such a stipulation may in some cases be penal. Whether it is a penalty or not is a question of construction. It is for the Court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of penalty. (d) In each of these cases the decision of the question depends in effect upon the construction of the document and upon ascertaining what the parties really intended by it (e)

(bb) Sic a manifest error for no

(c) Nanjappa v Nanjappa (1888) 12 Mad 161, 166 167 Ramalingam Chettiar v Subramania Chettiar (1927) 50 Mad 614 103 I C 394

(d) Abbakke Heggadithi v Kinkhamma Sketty (1906) 29 Mad 491 496 P C

Pal v A I L R Firm (1973) 1 Rang 460 76 I C 835 A I R 1974 Rang 46

(e) Per Maclean C J in Deno Nath v Nibaran Chandra (1899) 27 Cal 491 424 followed (though not cited) Suk v Mal v Imam Din (1979) 114 I C 444 A I R 1979 Lah 515

'Such a contract as to interest must, we think, be held valid where there is no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person, or the like considerations" (f) For "it is of the utmost importance as regards contracts between adult persons not under disability and at arm's length that the Courts of law should maintain the performance of the contracts according to the intention of the parties" (g) On the other hand, the stipulation will be held penal, so as to relieve the debtor from his contractual obligation, if "the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties" (h), or where there are equitable considerations which would render the bargain unconscionable But the relief, where a proper case was made out for it was granted by the Court in its equitable jurisdiction, and not under s 74 for the section as it stood before the amendment was held not to apply to the class of stipulations now under consideration (i) The relief granted however, was the same whether it was under the Court's equitable jurisdiction or under the provisions of the section (j) And as to Act XXVIII of 1855 (repealing usury laws) it was held that it did not affect the equitable jurisdiction of Courts to relieve against a penalty (i)

**Effect of Act VI of 1899**—The section as it stood before the amendment applied only to those stipulations for enhanced interest when a sum was named in the contract as the amount to be paid in case of breach It was held not to apply to any stipulation for increased interest when the higher rate commenced from the date of default Relief, therefore, where such a stipulation was penal, was given not under the provisions of the section, but in the exercise of the Court's equitable jurisdiction The section as it now stands brings within its operation all stipulations in the nature of a penalty, as will be seen from the words "any other stipulation by way of penalty" The

(f) *S rja Narain Singh v Jogendra Narain Poo* (1832) 20 Cal 360 361 per Ligot J cited in 26 Cal 300 at p 310

(g) *Hall v Smith* (1849) 21 Ch Div 413 cited in 27 Cal 421 424

(h) *1st Sergeant C I in Umar Khan v Sulakhan* (1892) 17 Bom 106 113 114 and see *Kisanlal v Kisan Singh* 103 I C 118 A I R 1922 Nag 284

(i) *Umar Khan v Sulakhan* (1892) 17 Bom 106 *Parthian Bhu Khan Lal v Varsing Dyal* (1898) 20 Cal 700, *Jamen dra Poo v Serajulla Khamed* (1898) 2 C W N 234 *Manoo Heperi v Durga Churn Saha* (1898) 2 C W N 333 *Abdul Gani v Nandilal* (1901) 30 Cal 15

(j) *Abdul Gani v Nandilal* (1902) 30 Cal 15 19

result thereof is that in the case of a stipulation for a higher rate of interest from the *date of default* relief will now be granted, wherever such a stipulation is penal under the provisions of this section (k) and it will not be necessary for Courts to resort to their equitable jurisdiction to grant relief on that score. In other respects, the law as to stipulations for enhanced rate of interest remains what it was under the old section. The Explanation to the section is simply a legislative recognition of the proposition laid down in the under-mentioned cases (l) that a stipulation for enhanced interest from the date of default *may* be a stipulation by way of penalty (m). Illustration (d) which was added in the Act by Act VI of 1899, is an instance of such a stipulation. The increase of interest from 12 to 75 per cent is of itself so exorbitant as in the language of Sir James C. J. to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties (n). But a stipulation in a mortgage bond that if the mortgagor fails to pay interest at the end of every month at the agreed rate, which was Rs. 1 12 per cent per mensem the mortgagee shall be entitled to claim either interest at the rate of Rs. 2 per cent per mensem with effect from the date of default or payment of the whole of the principal and interest payable on the date of default is not by way of penalty. The stipulation only means this that the mortgagor is to pay a small increase in the rate of interest in return for the mortgagee not exercising forthwith his right to recover at once the whole amount due (o).

On the whole the law as to enhanced rate of interest under the section as amended may now be stated as follows —

(a) A stipulation for increased interest from the date of the bond is *always* in the nature of a penalty and relief will be granted against it.

(b) A stipulation for increased interest from the date of default *may* be a stipulation by way of penalty, and whenever it is so relief will be granted under the section as amended and not independently.

(k) See *Telechand v. Flagg* (1911) 36 Bom 164 13 I C 853 *Najaf Ali Khan v. Muhammad Fazal Ali Khan* (1908) 107 I C 219 A I R 1908 All 255

(l) *Umarkhan v. Salekhan* (1892) 17 Bom 106 113 114 *Pardhan Bhukhan Lal v. Narsing Dyal* (1898) 26 Cal 300 310

(n) *Sankaranarayana Iadhyar v. Sankaranarayana Ayyar* (1901) 25 Mad 313 347

(o) *Umarkhan v. Salekhan* (1892) 17 Bom 106 113 114

(p) *P. C. Lal v. A. A. L. R. Firm* (1923) 1 Rang 460, 76 I C 835 A I R 1924 Rang 46

of it as before the amendment. Whether such a stipulation is penalty is a question of construction dependent upon the considerations set out above.

It should be stated that the current of decisions in Calcutta and Madras laying down the distinction between a proviso for retrospective enhancement of interest and a proviso for enhanced interest from the date of default, and treating the former as a penalty was for some time broken owing to a decision of the Privy Council in *Balkishen Das v. Run Bahadur Singh* (p). That case related to the construction of a decree which was founded on a *solehnama* between the parties and to the right of the appellant to execute to the extent of the provisions of that decree when properly construed. The decree was for payment of money by instalments with interest at 6 per cent, and it was construed to provide for three contingencies, one of which was that on default of payment of the first instalment interest should be paid at 12 per cent *from the date of the decree*. The Judicial Committee held that the stipulation for the higher rate of interest from the date of the decree was not a penalty, and added that, even if it were so the stipulation was not unreasonable, inasmuch as it was a mere stipulation of interest at 12 instead of 6 per cent per annum in a given state of circumstances. Following this decision, it was held in some cases (q) that a stipulation in a contract for a higher rate of interest from the *date of the contract* is not unenforceable and that it cannot be treated as a penalty, but must be interpreted, as other parts of a written contract should be interpreted, according to the expressed intention of the parties. Those cases however, are no longer of authority, and in later cases (r) the decision of the Privy Council was

(p) (1883) 10 Cal 305, L R 10 I A 162

(q) *Basu Nath Singh v. Shah Ali Hosain* (1886) 14 Cal 248, *Basavayya v. Subbaramu* (1888) 11 Mad 294, *Varayanasami Nair v. Varayana Iyer* (1893) 17 Mad 62. See also *Arjun Iyer v. Asgar Ali* (1886) 13 Cal 200-03 where the note of discord was first struck, see also *Arulu Mastey v. Balakrishna Chinnaiye* (1864) 2 M H C 205.

(r) *Kalachand Ayal v. Shih Chunder* (1892) 19 Cal 302 overruling *Priy Nath*

*Singh v. Shah Ali Hosain* (1886) 14 Cal 248. *Bul Nath Das v. Shamasant Das* (1894) 22 Cal 143. *Jardhin Bhadrin Lal v. Varnag Dyal* (1898) 25 Cal 700. *Deno Nath v. Vcharin Chandra* (1899) 27 Cal 421. *Imamur Feroz Singh v. Ili Shari Kishan* (1901) 29 Cal 47. *Abdul Cams v. Nur Hal* (1902) 30 Cal 15. *Vinayappa v. Vinayappa* (1885) 12 Mad 161 (no reference is made in this case to the earlier case of *Vinayappa v. Subbaramu* (1888) 11 Mad 294 which followed the Privy Council decision in *Calcutta v.*

held not to be applicable to the class of cases under consideration (s), and the Courts reverted to the former view they had taken of s 74 as originally enacted. So far as the Allahabad High Court goes, there have been only two cases (t) under the old section since the Privy Council decision, and that decision was followed in both of them. In the later of the two cases it was held by a full Bench of that Court that s 74 as originally enacted did not apply to an agreement to pay alternative rates of interest whether the higher rate was payable from the date of the contract or from the date of default on the ground that it could not be said in either case that there was a sum named in the contract as the amount to be paid in case of breach (u). The Explanation to the amended section read with illustration (d) makes it clear beyond all doubt that the section as amended applies to stipulations for alternative rates of interest and the newly added words 'any other stipulation by way of penalty' are wide enough to comprise cases in which no sum may be named as the amount to be paid in case of breach (v). And it is now held by the High Court of Allahabad under

*Venkataramnam* (1894) 18 Mad 175  
*Sankaranarayana Iadhar v Sankaranarayana Ayyar* (1901) 25 Mad 343,  
*Annamalai Chetty v Jeerabadram Chetty*  
 (1902) 26 Mad 111

(v) For reasons see *Vanjappa v Vanappa* (1888) 12 Mad 161 165 166  
*Kalacland Hyal v Shib Chunder* (1892)  
 19 Cal 390 396 *Markhan v Salekhan*  
 (1892) 17 Bom 106 110

(vi) *Banerji Das v Mukharad Das*  
*Das* (1887) 9 All 630 *Bank Behari v*  
*Sundar Lal* (1893) 15 All 232

(u) See also *Bay Nath Singh v Shah Ali Hosain* (1886) 14 Cal 248 where Mitter J said. In either of the cases mentioned above no amount is named in the contract as the amount to be paid in case of breach. It is true that on the date when the breach took place the amount that under the contract would be due on that date to the creditor could be ascertained by arithmetical calculation, but that is not a case where it can be said that that amount is named in the

contract as the amount to be paid in case of a breach. Then again the amount which may be ascertained by such calculations is not the whole amount which is named in the contract as the amount to be paid in case of a breach even if it be conceded that the use of the word named does not make any difference. The whole amount which in consequence of the breach would be payable to the creditor cannot be precisely ascertained on the date of the breach even by arithmetical calculation because the breach continues so long as the money is not repaid after due date and therefore to use the language used in the judgment of Mr Justice Wilson no one can say at the time of the breach what the sum will be.

(v) In *Annamalai Chetty v Jeerabadram Chetty* (1902) 26 Mad 111 it was assumed that the section as amended applied to cases of alternative rates of interest.

the revised section that a stipulation for enhanced interest as from the date of the bond is a stipulation by way of penalty (w)

A provision for reduction of interest if paid in advance is not penal (x) In a less simple case, A lends money to B at interest at Rs 280 per cent per month Subsequently, on a settlement of accounts between the parties, it is agreed that A should charge interest at the rate only of 8 annas per cent per month on the balance due, if the same was paid within a certain date, but if not so paid, B should pay the balance with interest at the original rate of Rs 280 per cent per month The stipulation for the payment of interest at Rs 280 per cent per month in default of payment of the balance within the fixed period is not by way of penalty "Here the higher rate of interest was only that originally payable under the bond and the new bargain was merely a concession to the [debtor] of which he failed to take advantage This is not the case of a lower rate of interest being mentioned in the bond, with a provision that, if the debt be not paid, a higher rate shall prevail as from the date of the loan" (y)

II Stipulations for compound interest (z) — A stipulation in a bond for payment of compound interest on failure to pay simple interest at the same rate as was payable upon the principal is not a penalty within the meaning of this section (a) But a stipulation for the payment of compound interest at a rate higher than that of simple interest is a penalty within the meaning of this section, and would be relieved against As observed by the Judicial Committee in *Sunder Koer v Rai Sham Krishen* (b), "compound interest is in itself perfectly

(w) *Brij Bhukhan v Sami ud din* (1902) 25 All 169

(x) *Admr Gen of Burma v Moolla* (1927) 5 Rang 573 105 I C 592 A J R 1928 Rang 19 (elementary learning in England)

(y) *Karti Chunder Chatterji v Atkinson* (1906) 10 C W N 610

(z) The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment it is in the absence of dis-entitling circumstances allowed' *Hars Lalji Lalit v Lajmi Valad Janlu* (1904)

28 Bom 371, 377

(a) *Ganga Dayal v Buchchu Lal* (1902)

25 All 26, *Surya Narain v Jijendra Narain* (1892) 20 Cal 360, *Bhola Nath v Patch Singh* (1883) 6 All 63, *Janki Das v Ahiaul Hussain* (1902) 25 All 159, *Mul Singh v Kishan Gopal* (1904) 100 J Rec no 58, *Lekhi Chind v Icar Chand* (1917) 2 Pat I J 283 39 I C 100, *Islul H v Purni Mal* (1914) 100 J Rec no 82 p 289 25 I C 160, *Malhi Chelvar v Veeranna Terun* (1921) 41 All I J 470, 69 I C 812

(b) (1906) 31 Cal 150, at p 158 I R 31 I A 9 *Mangul Das v Jai'n*

legal but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation may well be regarded as in the nature of a penalty. Thus where a bond provided that interest should be payable at the end of each year at the rate of Rs 1 1 per cent per mensem and that in default compound interest should be paid at the increased rate of Rs 3 2 per cent per mensem it was held that the stipulation was one by way of penalty, and the Court allowed compound interest at the same rate as simple interest (c)

Similarly it was laid down in an Allahabad case that a stipulation that in default of payment of interest when due the debtor should pay an increased rate of interest as well as compound interest amounts to a penalty (d). The ground of the decision was that the two stipulations put together could not be regarded as a fair agreement with reference to the loss sustained by the lender by reason of the breach of the contract. By the terms of the bond in that case the interest was to be at the rate of 9 per cent per annum and was payable yearly and there was a proviso that if it was not paid when due it should be increased to 15 per cent per annum, and should be calculated as compound and not as simple interest (e). This case was dissented from by the Madras High Court. The bond in that case provided that, if any instalment of interest (which was 2 per cent per mensem) was not paid on the due date, the debtor should pay compound interest at the same rate "from the expiry of the instalment" and that, if the principal was not paid within a year he should "from that date pay interest at an enhanced rate, namely 3 per cent per mensem". The Court said that the only question was whether an agreement to pay an increased rate of interest as well as compound interest amounted to a penalty and held that there was nothing penal in the bond putting the decision on the ground that if parties enter into extortionate bargains with their eyes open they are not entitled to relief unless the unfair nature of the transaction

Singh 103 I C 437 A I R 1927 Mad 111 *Belari Lal v Isaram* 10,  
Lah 445 8 Lah 721 9 Lah L J 301 I C 477 A I R 1927 Lah 445 9 Lah  
L J 301

*Lama uria Rao v Damojeeপুরa*  
*Ramanna Pantulu* (1927) 104 I C 827 (d) *Dip Nara n Rai v Dipan Rai* (1886)  
8 All 185

(c) *Baid Nath Das v Shamanand Das*  
(1894) 22 Cal 143 155 156 followed in  
*Rameswar Irosad Singh v Rai Sham*  
*Kishe* (1901) 29 Cal 43 51 *Annamalai*  
*Chetty v Meerabadrari Chetty* (1902) 26

(e) The Court reduced the interest to  
Rs 9 per cent per annum reckoned at  
compound interest with yearly rests up  
to the due date of payment

was not known to them, advantage having been taken of youth, ignorance, or credulity (f)

No reference was made in either of these cases to s 74 of the Act. It is submitted that the facts in the two cases were quite different and gave rise to different questions. In the Allahabad case the debtor became liable on default to pay a higher rate of interest not from the *date of default*, that is, the date on which the instalment of interest became due, but, so far as it appears from the report, from the date of the commencement of each instalment of interest (g). This stipulation would of itself be now regarded as penal independently of the condition for payment of compound interest. But the liability on default under the terms of the bond was not only to pay the enhanced rate from the date of the commencement of each instalment, but also compound interest at that rate—a stronger case than the one which merely provides for compound interest at a rate higher than simple interest. In the Madras case, on the other hand, the first stipulation for compound interest at the same rate as simple interest was lawful, though the second stipulation for payment of interest at an increased rate from the *date of default* (h) may or may not be one by way of penalty according to the circumstances of the case (see Explanation to the section, p 433, above).

The distinction has been explained by the Judicial Committee:—“The Indian Courts have invariably held that where (as in the present case) the stipulation is retrospective and the increased interest runs from the date of the bond and not merely from the date of default it is always to be considered as a penalty, because an additional money

(f) *Appa Rao v Suryanarayana* (1887) 10 Mad 203. The terms of the bond as respects interest were as follows:—Should I so fail to pay the amount of interest I shall pay the interest at 2 per cent per month, as stated above, on the amount of the interest also from the expiry of the instalment. I shall pay the principal the amount of interest due and the amount of interest thereon within one year. Should I fail to clear a year hence the whole amount due to you I shall pay you the whole of the amount due together with interest on it from that date at the rate of 3 per cent per month.

See *Abbakke Heggillthi v Kinkamma Shetty* (1906) 29 Mad 491 at p 496.

(g) The terms of the bond are not set out in the report. The only other construction would be that the higher rate was to be paid from the date fixed for the payment of the instalments with compound interest in which event the case would be one of payment of compound interest at a rate higher than that of simple interest.

(h) The words in the bond are ‘from that date,’ which only mean from the expiration of the year being the period of the loan.

payment in that case becomes immediately payable by the mortgagor. Their Lordships accept that view of the statute" (1)

A stipulation that interest in arrear shall be capitalised and added to the principal sum and that the whole shall carry interest at the *contract* rate is not by way of penalty (2)

**III Stipulations for payment of interest if principal not paid on due date.**—We next proceed to consider cases where the bond does not provide for the payment of two rates of interest, one lower and the other higher, but for the payment of interest at one specified rate if the principal money or part thereof is not paid within a stipulated period. The decisions on the subject are not quite uniform and require examination. But before doing so it may be as well to note the provisions of Act XXVIII of 1855, as they have a close bearing on the subject. That Act abolished all usury laws and s 2 thereof provides that "in any suit in which interest is recoverable the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties, and if no rate shall have been agreed upon at such a rate as the Court shall deem reasonable." It will have been observed from what has preceded that the provisions of the Act of 1855 do not apply, and the Court will not decree interest at the agreed rate where the agreement provides for alternative rates of interest and the stipulation for the higher rate of interest is one by way of penalty. Such stipulations would now come within the scope of s 74 and the provisions of the said Act are so far modified by that section (3). Where, however, there is a stipulation for a single rate of interest the question arises whether the provisions of s 2 of Act XXVIII of 1855 invariably apply to all such cases so that the Court should award the agreed rate of interest or whether any relief could be granted where such rate appears to the Court to be penal and if so whether this could be done under s 74 as now amended. In *Motoji v Shekh Husen* (4) where a promissory note after stipulating for payment by monthly instalments *without interest* provided for interest at the rate of 75 per cent per annum in default of payment of any one instalment,

(1) *Sindar Koor v Sham Krishen* (1906) 1 R 341 A 917 34 Cal 120 C1 *Lishen Chandel v Narain Singh* 110 I C 311 A 111 115 Cal 87

(2) *Sarju Prasad v Beni Madho* (1883) All W N 208

(4) The contrary view taken in *Bay Nath Singh v Shekh Ali Hassan* (1886) 14 Cal 48 as in *Heinle Lohari v Sundar Lal* (1893) 1 All 223 224 *et seq.*, cannot now be sustained.

(3) (1861) 6 B H C 468

it was held by the High Court of Bombay that the stipulation for interest was a penalty. In *Para v Govind* (m) a promissory note provided for repayment of principal without interest within three months from the date thereof, and that in default interest should be paid at 75 per cent per annum. It was held by the same Court, following *Motoji v Shekh Husen* (n), that the rate of interest was a penalty, and that Act XXVIII of 1855 did not destroy the equitable jurisdiction of the Courts to relieve against a penalty (o). In *Bansidhar v Bu Ali Khan* (p) the defendant agreed to repay to the plaintiff a loan of Rs 50 on a certain date, and in default to pay interest at Rs 1 per day, that is, at the rate of Rs 730 per cent per annum. It was held by the High Court of Allahabad that, looking at the entire instrument, the amount of interest appeared to be in the nature of a penalty because "one rupee per diem for failure to pay Rs 50 is, as interest, an extortionate amount for which no adequate consideration

(m) (1873) 10 B R C 382

(n) With which case it was said the case was on all fours. *Id* 383

(o) In *Dullabhdas v Lakshmandas* (1859) 14 Bom 200, Scott J said that the case of *Para v Govind* dealt with an agreement which on default in payment of the original rate imposed the enhanced rate on the defaulting party from the date of the original debt. In *Umarkhan v Salekhan* (1892) 17 Bom 106, on the other hand Sargent CJ said that an examination of the facts in *Motoji v Shekh Husen* and *Para v Govind* left no doubt that the Court was in that case dealing with prospective enhancement of interest. See also *Halima Manji v Ver in Ayab* (1870) 7 B R C 19 where the same view was taken. It may be noted that *Umarkhan v Salekhan* was referred to a Full Bench and the Divisional Bench, in making the order of reference, said: "Having regard to the conflict of decisions between *Para v Govind* on the one hand and *Dullabhdas v Lakshmandas* on the other we think it right to refer it to a Full Bench to decide whether a clause in a bond entitling the rate of interest on

default of payment of the principal debt and interest at the time fixed is to be regarded as a penalty." How the two decisions were conflicting it is not easy to see, for *Para v Govind* was not a case of alternative rates of interest (see this statement borne out in *Bank Behari v Sundar Lal* (1893) 15 All 232 255) while in *Dullabhdas v Lakshmandas* there were two rates of interest and the higher rate was payable from the date of default, and the Court held it was not a penalty. In the Full Bench case, Sargent CJ was inclined to think that the decision in *Para v Govind* could be supported on the ground that the enhanced rate of interest in that case was such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties. 17 Bom pp 113, 114.

(p) (1880) 3 All 201, *Chakur Mal v Mir* (1880) 2 All 15, where the interest payable on default was Rs 320 per cent per mensem, and the Court held that it was penal. In *Mayer Puri v Naulat* (1885) All W N 12 the rate was 24 per cent per annum and it was held to be not penal.

is shown, and which no man would contract absolutely to pay." As to s 2 of Act XXVIII of 1855, it was said that if the terms of that section strictly applied in every case it would be impossible to say to what extravagant and extortionate extent the most usurious claims under the name of "interest" might not be carried. In a later Allahabad case (q) a stipulation to pay the amount of a bond on a certain day without interest and in default to pay interest at the rate of 24 per cent per annum was held to be not penal on the ground that the interest claimed was "contract interest." The Court added that, even if it had been penal, the rate was not so exorbitant that the Court would be justified in reducing it. None of these cases was decided with reference to s 74. In *Vythilinga v Ravana* (r) the defendant agreed to repay a loan of Rs 10 within fifteen days, and in default to pay interest at the rate of one anna per rupee per diem, that is, at the rate of Rs 2,250 per cent per annum. The Madras High Court held that the stipulation for interest was penal, one of the learned Judges holding that the case was covered by s 74, and the other doubting whether that section affected the case at all, but both following an earlier decision (s) of the same Court, which, however, was a case of alternative rates of interest.

In *Arjan Bibi v Asgar Ali* (t) the bond provided for the repayment of the loan within a certain period, and in default for interest from the date of the bond at 150 per cent per annum. The High Court of Calcutta awarded interest at the agreed rate, holding that the agreement was one for payment of interest within the meaning of s 2 of Act XXVIII of 1855, and did not fall under s 74, as there was only one rate of interest agreed to be paid, and the bond did not provide for the payment of two rates of interest. The same view has been taken by the Chief Court of the Punjab (u). In *Sankaranarayana Vadhyar v Sankaranarayana Ayyar* (v) the bond provided for the payment of the principal by twelve instalments, and it was provided that in default the debtor should pay the whole amount of the loan

(q) *Kunjabeharilal v Ilahi Bakhsh* (1883) 6 All 64

(r) (1882) 6 Mad 167

(s) *Vengadeswara v Chatu Achen* (1881) 3 Mad 224

(t) (1886) 13 Cal 200

(u) *Gokal Chund v Khwaja Ali* (1890)

Punj Rec no 32. But see *Kanhaya Lal v Narain Das* (1894) Punj Rec no 99

(v) (1901) 25 Mad 343. *Chinna v Pedda* (1902) 26 Mad 445. (The rate of interest in this case was 12 per cent per annum.)

on demand with interest at the rate of 180 per cent per annum. The Madras High Court held, dissenting from *Bansidhar v Bu Ali Khan* (w) and approving *Arjan Bibi v Asgar Ali* (x), that, only one rate of interest having been provided for, the case was not governed either by s 74 as it formerly stood, or by the amended section, and that the plaintiff was entitled to interest at the agreed rate under Act XXVIII of 1855, as that rate could not be said to be exorbitant, "having regard to the relations between the parties and the circumstances in which the defendant undertook the obligation which he failed to fulfil" (y). In *Prayag v Shyam Lal* (z) it was held by the High Court of Calcutta that simple or compound interest (which was 75 per cent per annum in the case) is not in itself penalty. The interest in that case ran from the date of the bond, and was not payable on default only of payment of the principal sum as in the preceding cases. The case, therefore, does not belong to the group of cases now under examination but it is noted here, as the Court said that the case was governed by the revised section.

It will have been seen that in *Motoji v Shelkhusen* (a), *Para v Govind* (b), *Bansidhar v Bu Ali Khan* (c), and *Vythalinga v Ravana* (d), cited above, the exorbitant rate of interest was of itself regarded as penal. On the other hand, in *Arjan Bibi v Asgar Ali* (e) and *Sankaranarayana Vadhyar v Sankaranarayana Ayyar* (f) the Court declined to grant any relief, though the rate of interest in one case was 150 per cent per annum, and in the other it was 180 per cent. The effect of these two decisions as well as the decisions in *Prayag v Shyam Lal* (z) is that, the rate of interest having been agreed upon between the parties, it should be allowed under the provisions of Act XXVIII of 1855, and the mere fact that the rate of interest is exorbitant is no ground of relief unless the transaction amounts to an "unconscionable bargain". The principle of these decisions, it is submitted, is not sound, for, following it to its logical consequences, any rate of

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|--|--------------|--|
| (w) (1880) 3 All 260                         | See note (p) | Rs 5 per month and interest was awarded at that rate |
| (x) (1886) 13 Cal 200                        |              | (a) (1869) 6 B H C 1 C 8                             |
| (y) 25 Mad 1 p 316 319                       |              | (b) (1873) 10 B H C 382                              |
| (z) (1903) 31 Cal 138                        | See also     | (c) (1880) 3 All 260                                 |
| <i>Arishna Kumar v Brojo Nath Roy</i> (1903) |              | (d) (1882) 6 Mad 167                                 |
| 7 C W N 876 where a loan of Rs 300           |              | (e) (1886) 13 Cal 200                                |
| carried compound interest at the rate of     |              | (f) (1901) 25 Mad 313                                |

interest, however exorbitant, would not be regarded as penal. The correct principle, it is conceived, is the one laid down in the first group of the cases mentioned above, namely, that relief should be granted whenever the rate of interest appears to the Court to be penal notwithstanding the provisions of the Act. This view had been adopted by the High Court of Calcutta in *Mujan Patari v Abdul Juhhar* (g), where it was held, dissenting from *Arjan Bibi v Asgar Ali* (h) and *Sankaranarayana Vadhyar v Sankaranarayana Ayyar* (i), that a stipulation for the payment of interest at the rate of 75 per cent per annum from the date of the bond, on failure to pay the principal sum in two instalments on the dates fixed, was in the circumstances of the case a penalty. There are later decisions to the same effect by a full Bench of the Madras High Court (j), who held, dissenting from *Sankaranarayana Vadhyar v Sankaranarayana Ayyar* (i), that where no interest is payable until default, but interest at an exorbitant rate is payable as from the date of default, the Court has power to treat the latter stipulation as a penalty, and by the High Court of Bombay, following its previous opinion (k).

Before the amendment of the section relief was properly granted by Courts in the class of cases under consideration in the exercise of their equitable jurisdiction, for s 71 as originally enacted could not apply to the case. Whether after the amendment relief should be granted under the amended section is open to some doubt. On the one hand, the section as now amended extends to 'any stipulation by way of penalty,' and this expression is wide enough to cover the class of cases now under consideration and this is now the opinion of almost all the High Courts (l). On the other hand, the subject matter of the section relates to what is known in English law as the

(g) (1906) 10 C W N 1070  
*Ahagaram Das v Pammankar Das* (1915) 42 Cal 672, 27 I C 817. *Abdul Majeed v Akhrode Chandan Pal* (1915) 42 Cal 690 pp 694-699, 29 I C 847, *Ugendra Lal v Mehraj Bibi* (1916) 21 C W N 104, 36 I C 404. *Nabo Kumar v Syed Abdul* (1916) 21 C W N 112, 36 I C 721 the last two being cases under the Bengal Tenancy Act 1885.

(h) (1886) 13 Cal 200

(i) (1901) 25 Mad 343

(j) *Mutulrishna v Sankara Lingam* (1913) 36 Mad 270, 18 I C 417

(k) *Ichchand v Flagg* (1911) 36 Bom 164, the view taken in *Kishan v Sudaram* 104 I C 191. A I P 1927 Nag 338 seems too narrow.

(l) *Mutulrishna v Sankara* (1913) 36 Mad 270, 18 I C 417, *Ahagaram Das v Pammankar Das* (1915) 42 Cal 672, 27 I C 815, *Ichchand v Flagg* (1911) 36 Bom 164.

doctrine of penalty and liquidated damages, and stipulations for interest of the class we are now dealing with do not fall under either of those two heads. If so, we venture to think that where a proper case is made out for relief the Courts could grant it as before under their equitable jurisdiction. The question is not, however, of much practical importance, for the relief, however granted, would be the same in its nature and extent.

IV Stipulations for payment of interest at a lower rate, if interest paid regularly on due dates —Where a bond provides for payment of interest at 24 per cent per annum with a proviso that, if the debtor pays interest punctually at the end of every year, the creditor would accept interest at the rate of 18 per cent per annum, the creditor is entitled on failure of payment of interest on the due date to interest at the higher rate of 24 per cent per annum. Such a clause is not in the nature of a penalty (m). In a Calcutta case the stipulation was for payment of interest at  $9\frac{1}{2}$  per cent, to be reduced to  $7\frac{1}{2}$  per cent on punctual payment, but the scheme for liquidation of the mortgage debt which was a material part of the mortgage deed showed that interest was calculated at  $7\frac{1}{2}$  per cent only. Upon these facts the Court held that the stipulation for payment of  $9\frac{1}{2}$  per cent was a penalty, and it allowed interest at  $7\frac{1}{2}$  per cent and further interest upon interest at  $7\frac{1}{2}$  per cent in respect of payment not punctually made (n). Cp p 443 above.

V Stipulations for payment of interest from date of bond, the rate of interest being exorbitant —The question to be considered under this head is, whether a stipulation for payment of interest can be deemed a "stipulation by way of penalty" within the meaning of this section, if the bond provides for payment of interest at one rate from the date of the bond, provided the rate is high and exorbitant. This may be put in the form of an illustration thus —A borrows Rs 500 from B on 15th October, 1917, and gives him a bond for that amount, promising to pay the principal with interest thereon at the rate of 75 per cent per annum on 15th January, 1918. A does not repay

(m) *Kutub Ud Din v Bashir Ud Din* (1910) 37 All 418. *Ful Holmes v Bank of Upper India Ltd* (1923) 4 Lah 209.  
71 C L J 3. A I R 1923 Lah 518.  
*Ball v Smith* (1889) 21 C L J 1.

*Wallington v Mutual Society* (1880) 5 App Cas 685. 70.  
(n) *Skymperry v The Eastern Mortgage & Agency Co., Ltd* (1917) 21 C W N 212. 211. 40 C L J 86.

the loan on 15th January, 1918 B sues A to recover the amount of the loan with interest at 75 per cent per annum Is B entitled to interest at the rate of 75 per cent per annum, or has the Court power under this section to reduce the rate of interest ? It is assumed that B was not in a position to dominate the will of A within the meaning of s 16 above (o) and that the only question to be considered is whether the Court has power under the present section to reduce the rate of interest It has been held by the High Court of Calcutta that there being a breach of the contract by A as contemplated by this section, the only other point to consider is whether the stipulation to pay interest at the rate of 75 per cent per annum is a "*stipulation by way of penalty*" within the meaning of this section Whether the stipulation to pay interest at the rate of 75 per cent per annum is a stipulation by way of penalty is, according to that Court, a question of fact depending on the circumstances of each case, and if the Court finds that the rate of interest is of a penal character the Court has power under this section to grant relief (p) On the other hand it has been held by the High Court of Madras that the present section does not apply to cases like the above the reason given being that there cannot be a stipulation by way of penalty unless there is another antecedent promise "If the promise is to pay a certain sum on a particular day and in default of payment on that day to pay interest, then the agreement to pay interest may be a stipulation by way of penalty" (q) The Madras decisions, it is submitted are correct It appears from the judgments of the Calcutta High Court that the only portions of the present section which that Court considered material for the determination of the question before them were (1) 'when a contract

(o) See notes to s 16 *Unconscionable bargains* p 108 above

(p) *Krishna Charan v Sanat Kumar Das* (1917) 44 Cal 162 33 I C 609 [rate reduced from 75 per cent to 15 per cent] *Bomrang Faja Chellaphroo v Banga Behari Sen* (1910) 20 C W N 408, 31 I C 394 [rate reduced from 48 per cent to 12 per cent] *Abdul Majeed v Khirode Chandra Pal* (1914) 42 Cal 690, 29 I C 843 [rate reduced from 60 per cent compound interest to 30 per cent simple interest] See also *Gopeshwar v Jadav*

*Chandra* (1916) 43 Cal 632 at p 639 32 I C 537

(q) *Ponnusami v Adimuthu* (1917) 33 Mad L J 302 42 I C 231 *Kesavulu v Arithulas* (1913) 36 Mad 533 22 I C 769 *Najaf Ali Khan v Muhammad Faal Ali Khan* (1927) 26 All L J 210, 107 I C 249 (rate reduced from 37 to 12 per cent) See in this connection *Debi Sahai v Ganga Sahai* (1910) 32 All 589 and *Gendan Lal v Shahadi* (1913) 11 All L J 155, 18 I C 765, where s 74 was not considered

has been broken," and (2) "If the contract contains any other stipulation by way of penalty" The learned Judges do not seem to have taken into consideration the words "in case of such breach" and the words "the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby to receive from the party who has broken the contract reasonable compensation not exceeding the penalty stipulated for" These words read with what precedes indicate unmistakably that the penalty stipulated for is one payable "in case of breach" in other words, a penalty which arises in default of performance The language of illustrations (d), (e) (f) and (g) also points the same way This view is further strengthened if it be remembered that the compensation contemplated by this section is that paid for the breach of the contract In the case put above the contract is to repay the amount of the loan with interest The breach takes place if A fails to pay the loan with interest There is no sum named in the contract as the amount to be paid "in case of such breach" nor does the contract contain any other stipulation by way of penalty, that is penalty payable in case of such breach To such a case, it is respectfully submitted, the present section does not apply It seems preposterous to say that 75 per cent per annum or any lower rate of interest which the Court may award is "compensation" for breach of the contract The Patna High Court has taken much the same view as the Madras High Court (r) It is not necessary however to pursue this matter any further for cases of the kind now under consideration arising since the enactment of the Usurious Loans Act 1918, will be dealt with under that Act That Act empowers the Court to relieve against exorbitant interest where (1) the interest is excessive, and (2) the transaction was substantially unfair see s 3 of the Act

**Deposit on agreement for purchase**—Forfeiture of earnest money by a defaulting purchaser is not a penalty but a term that a lump sum shall be paid in addition is penal and only actual damage can be recovered under it (s)

**Forfeiture of salary**—Where under the terms of a contract of employment it is agreed that the servant shall forfeit all arrears of

(r) *Nathani v. K. N. S. I. J. Nath I. J. Nath* (1917) 2 Pat 1 1 12 11 10-218 31 (1920) 31 Bom 1 11 100  
I C 35.

wages that had not yet become payable though due, in default of giving his employer notice before leaving his service, the stipulation is not by way of penalty, nor is it illegal under s 23. Thus, where a servant is engaged by the month, and the salary of each month is to be paid on the 22nd of the next month, and fifteen days' notice is to be given before leaving service, the servant leaving on 20th April without giving notice is not entitled to his salary either for March which had become due (though not payable) or the broken period of April (t). But a stipulation that an employee should work on holidays, including Sundays, if required by the employer to do so, and should be liable on refusal to forfeiture of fifteen days' wages, has been held to be in the nature of a penalty and one which the Court should not enforce (u).

“Reasonable compensation”—The words of the section give a wide discretion to the Court in the assessment of damages. “The only restriction is that the Court cannot decree damages exceeding the amount previously agreed upon by the parties. The discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation though of course, the expression ‘reasonable compensation’ used in the section necessarily implies that the discretion so vested must be exercised with care, caution and on sound principles” (v). In the exercise of this discretion the Judicial Committee has affirmed a judgment giving, as reasonable in the particular case, compensation at the same rate as the increased interest stipulated for (w). And generally it is open to the Court under this section to award as compensation a sum equal to the agreed penalty, provided that it does not appear to the Court to exceed what is reasonable (x). Where the defendants agreed to deliver a certain quantity of indigo plant to the plaintiff on a certain day and in default to pay a certain sum as damages, it was held that the plaintiff

(t) *Empress of India Cotton Mills Co v Naffer Chunder Poy* (1898) 2 C W N 687, *Aryodaya Spg & Co Ltd v Sitabkhand* (1911) 13 Bom L R 19.

(u) *Anar Singh v Karam Singh* (1914) 14 Ind Pcc no 50 167, 25 I C 441.

(v) *Nat Pan v Shih Dat* (1885) 5 All 23 242 distinguished in *Dilkar Sarkar v Joyram Kurmi* (1895) 3 C W N 43 where it was held having regard to the

object of the agreement that the measure of compensation was not merely the actual loss sustained by the plaintiff as in *Nat Pan v Case*.

(w) *Sundar Koor v Naran Krishen* (1906) 34 Cal 150 I I 34 I A 9.

(x) *Abulke Heggadik v Kankannama Shetty* (1906) 29 Mad 491 496 *Misra Haran v Saran Ali* (1910) 1 Ind Pcc no 61.

was not entitled to anything more than "reasonable compensation" "The method of assessing damages," it was said, "would be to ascertain the quantity of indigo which would have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which indigo might have been fairly sold in the market during the season to which the contract relates, and to deduct from such price the ordinary charges of producing and selling the quantity of indigo in question" (v). Similarly it has been held by the High Court of Bombay that the measure of damages for breach of a contract to borrow moneys at interest for a certain period is not the difference between the agreed rate of interest and that realized by the lender from his bankers *for the full period of the loan* but only for such period as might be reasonably required to find another borrower of a similar amount at the agreed rate (v). In a Calcutta case in 1895 (a) the defendant executed a *kubdit* by which he agreed to pay rent at rates of eight annas, four annas and two annas per bigha for a period of seven years and, if he cultivated the land on the expiry of the term without executing a fresh *kubdit*, to pay rent at a uniform rate of Rs. 4 per bigha. The defendant continued to hold the land after expiry of the said period without executing a fresh *kubdit* and the plaintiff sued for arrears of rent at the rate of Rs. 4. It was held that the stipulation for the higher rate of rent was in the nature of a penalty, and the Court allowed rent at the former rates. Rampuri J. gave a dissenting judgment, holding that s. 74 did not apply as the suit was not brought on the allegation that a contract had been broken, but was one to recover arrears of rent at a rate at which the defendant agreed to pay on his failure to execute a fresh *kubdit*. The learned Judge further held that the rate of rent mentioned in the *kubdit* was intended as the amount to be paid in case of a breach of the contract. But a stipulation by a tenant that if he failed to deliver at a specified time a certain quantity of rice by way of rent (i) and to pay Government revenue on a specified date (ii) might be held to be in the nature of a contract and not a penalty (b). This decision was based on the

principle enunciated by Jessel M R in *Wallis v Smith* (e), that "where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling some of which may be for the payment of money on a given day, in all these cases the Judges have held that this rule (that is, the rule as to penalties) does not apply, and that the bargain of the parties is to be carried out" And upon the same principle where a deposit was made with a railway company by the purchaser of a season ticket for one month, and the ticket was issued on conditions one of which was that the ticket was to be delivered up at the office of the company on the day after expiry, and another condition provided that the ticket and all benefit thereof, including the deposit, should be absolutely forfeited to the company if it should be lost, or in case of breach of any of the other conditions it was held that the ticket holder was not entitled to a return of the deposit where the ticket was delivered up some few days after the expiry of the month (f) In a Madras case a contractor agreed with a railway company to supply for a term of twelve months 2 400 tons of fuel at 200 tons per month and deposited with the company Rs 350 for the due fulfilment of the contract The contract contained various stipulations as to its proper performance and empowered the company to cancel the contract and forfeit the deposit if the contractor failed to make punctual delivery in accordance with the terms of the contract and the specification thereto annexed The contractor having failed in performance of the contract the company cancelled the contract and forfeited the deposit The question arose whether in law the deposit was liable to be forfeited The Court held that it was The rule governing the class of cases under consideration is that where the instrument refers to a sum deposited as security for performance the forfeiture will not be interfered with if reasonable in amount' The present section it was said did not apply to the case (g) Similarly, where the plaintiff agreed to forfeit all arrears of wages if he left the service of the defendant without fifteen days' previous notice, it was held that the present section did not apply and that the plaintiff by leaving the service of the defendant without giving the required notice

(e) 21 Ch Div 243 258

*Railway Co* (1906) 29 Mad 118 *Singer*

(f) *Cooper v London and Brighton*

*Manufacturing Co v Raja Prosad* (1909)

*Railway Co* (1879) 4 Ex D 88

36 Cal 960

(g) *Manian Patter v The Madras*

forfeited the arrears of wages (*h*) A stipulation in a building contract for a fixed sum to be paid daily or weekly for delay in completing the work seems not to be stipulation by way of penalty (*i*)

**Illustration (a).**—The case put in this illustration is that of a penalty to a common bond to secure the payment of money It may, however, be noted that where a certain sum of money is due, and the creditor agrees to take a lesser sum if that sum is paid on a certain day, and the debtor in default agrees to pay the larger amount actually due, it is not a case of a penalty (*j*)

**Illustration (b).**—This illustration shows that the penalty contemplated by this section may not only be to secure the payment of money, as in illustration (a), but to secure the performance of some collateral act (*k*) It must be presumed that the agreement mentioned, being in partial restraint of trade, is made in circumstances bringing it within one of the exceptions to s 27 of the Act

**Illustrations (f) and (g).**—A stipulation in a bond by which, on default of payment of one instalment, double the entire amount of the debt due under an instalment bond was to become at once payable, is in the nature of a penalty, not because payment is accelerated, but because the amount is enhanced (*l*) See illustration (g) That a stipulation for merely accelerating payment of the debt is not by way of penalty is shown by illustration (f) (*m*)

**Exception.**—In *Secretary of State for India v Dalsizian Freres* (*n*) the words “shall be liable” in the exception were construed as giving the Court a discretion not to levy the whole sum, but this seems contrary to the plain intention of the exception The same phrase occurs in ss 156 and 157 of the Companies Act, 1913, defining the

(*h*) *Express of India Cotton Mills Co v Viffer Chatter Ioj* (1898) 2 C W N 57

(*i*) See *Law v Fedlitch Local Board* [1892] 1 Q B 127, cp *Jones v St John's College* (1870) L R 6 Q B 115, these cases are on the Common Law distinction between penalty and liquidated damages (p 434 above)

(*j*) *Thompson v Hudson* (1871) L R 4 H L 1 A provision for acceptance of interest at a reduced rate on punctual

payment is familiar in English mortgage deeds

(*k*) See *Sloman v Walter* (1784) 2 W & T L C, 9th ed 221

(*l*) *Joshi Kalidas v Kols Dals* (1884) 1 L Bom 535, *Velchand v Flagg* (1911) 36 Bom 164

(*m*) See *Ex parte Burden* (1881) 16 Ch D 675 See also *Sterne v Fickel* 1 De G J & S 597 and *Hall v Ford v Mutual Society* (1840) 5 App Ca 685

(*n*) (1921) 45 Bom 1213 C I C 675

liability of a contributory and of a director of a company, and it there certainly imports no discretion. An administration bond executed by an administrator in accordance with s 256 of the Indian Succession Act X of 1865 (now s 291 of Act XXXIX of 1925) does not come within the exception so as to make the obligor liable, upon each of the conditions thereof to pay the whole amount mentioned therein (o). Similarly a bond given by a person to whom the right of collecting fees from vendors of goods in a market is formed by a Local Board under the Madras Local Boards Act stipulating that if he exacted fees in excess of the prescribed rates he should be liable to pay any fine not exceeding Rs 50 imposed by the president of the Board, is a bond "for the performance of a public duty or an act in which the public are interested" but it cannot be said to have been "given under the provisions of any law" for there is no section in the Act which authorises or requires the giving of such a bond. Such a bond therefore, does not fall within the exception so as to render the contractor liable to pay the full amount of the penalty on breach of the condition of the bond. The Board is only entitled to reasonable compensation not exceeding the amount of the penalty (p). It has been held by the Madras High Court that a contract with a municipality for the lighting of a town whereby it was stipulated that the deposit made by the contractor should be forfeited on any default made by him in carrying out the terms of the contract does not fall within this exception. "No doubt the public are in a sense interested in the proper lighting of the municipal town but the contract is not one for which any special provision is made in the Municipal Act (District Municipalities Act IV of 1881 Madras) and cannot be placed in a different category to a contract made with any private individual" (q). The amount deposited in the last mentioned case was Rs 500 and it was held that it was in the nature of a penalty and that it could not be enforced since the contract rendered the penalty "altogether irrespective of the importance of the breach". The principle of this decision was dissented from by the same Court in *Manian Patter v The Madras Railway Co* (r) on the ground that,

(o) *Lachman Das v Chater* (1887) 10

All 29

(p) *President of the Taluk Board  
Kundapur v Burde Lakshminarayana  
Kamphs* (1908) 31 Mad 54

(q) *Srinivasa v Rathnasabapathi* (1899)

16 Mad 474

(r) (1906) 29 Mad 118. See note (g)  
p 457 above

5. the case being one relating to a forfeiture of deposit for non performance, the rule by which it was governed was not the rule as to penalties, but the rule that the Court should not interfere with the forfeiture, if the amount was reasonable

**75.—**A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract (s)

Party rightfully rescinding contract entitled to compensation

*Illustration*

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre, and B, in consequence rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

This section is to be read as supplementary to ss 39-53 (which, however, already contains a similar provision), 55, 61, and 65. The facts of the illustration resemble those of illustration (a) to s 39, p 280 above. In such a case the English usage is to describe the promisee's right not as an option to rescind the contract but as an option to treat it as finally broken and have the damages assessed once for all (see note on s 39). The difference, however, seems rather verbal than substantial. A party who rescinds on the ground of fraud or the like is in a different position. He rescinds the contract not because fulfilment has been refused or prevented, but because the contract, by reason of the fraud, or as the case may be, is altogether to his disadvantage.

(s) This section appears fairly to cover the right of a buyer who has paid a deposit on sale to recover it back if the seller makes default, if any more specific authority is wanted than his remedy for breach of contract under the general provisions of s 73. But as rightly observed in *Parsi (or Pyre) Lal v. Vira Val* (1927) 50 All 82, 102 I C 706,

A I R 1927 All 6-1, the right to recover money paid on a consideration which has failed is not exhausted by statutory specifications. In *Bhagwandas v. Secy of State* (1921) 49 Bom 194, 87 I C, A I R 1925 Bom 227 the reportable point is not that this section was applicable but that a certain section of the Indian Forest Act was not.

## CHAPTER VII.

THIS chapter of the Act, comprising ss 76 to 123, is wholly repealed by the Indian Sale of Goods Act, 1930, s 65, but the numbering of the later chapters and sections is not altered.

A commentary on the Sale of Goods Act, incorporating so much of our former comment as is still applicable, will appear in due course as a separate volume. The revision and re-arrangement required for that purpose have been undertaken by Mr Ralph Sutton of Lincoln's Inn.

## CHAPTER VIII.

## OF INDEMNITY AND GUARANTEE

124.—A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a “contract of indemnity.”

*Illustration*

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 20 rupees. This is a contract of indemnity.

**Indemnity.**—English usage of the word ‘indemnity’ is much wider than this definition. It includes promises to save the promisee harmless from loss caused by events or accidents which do not or may not depend on the conduct of any person, or by liability arising from something done by the promisee at the request of the promisor, in the latter case a promise of indemnity may be inferred as a fact from the nature of the transaction (i) “Where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction or demand of another and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty” (ii). So Lord Davey stated one important application of the principle in the House of Lords. Bankers had innocently presented to a corporation a transfer of its own stock for registration, and transferees for value from them were registered as owners. The transfer to the bank turned out to be a forgery, and the true owner, in an action against the corporation, enforced restitution. The House of Lords, disagreeing with the Court of Appeal, held that the bankers must indemnify the corporation. Some good company lawyers regret the decision, thinking that the corporation’s duty was not merely

(i) *Dundale v. Llewellyn* (1877) 1 R. 100.  
12 C. P. 100

(ii) *Sheffield Corporation v. Barclays Bank Ltd.*  
(1903) A. C. 302, 303.

ministerial, since it was the guardian of its own register, having a discretion to make inquiries if thought fit, and "in theory a company is bound to exercise an active supervision to keep its register correct" (t). Again we say that a contract of insurance is a kind of contract of indemnity. But this language would, since the Contract Act, be improper in India (u).

The present chapter applies in terms only to express promises, but it should be noted that a duty to indemnify may be annexed by operation of law to various particular kinds of contract (cp s 69, p 382, above). On the sale of shares in a company the transferee is bound to indemnify the transferor "against future calls, whether made by the company or by a liquidator. The liability of the transferor in the event of a winding up is exactly analogous to the case of lessee and assignee, the former of whom is liable for breaches of covenant committed by the latter, but being only secondarily liable, has his remedy over against the person primarily liable, the assignee. That is the case of *Moule v Garrett*" (x). The same Judge had said in the case cited by him (y) "Where a party is liable at law by immediate privity of contract, which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the contract is taken by the defendant, the former is entitled to be indemnified by the latter in respect of the performance of the obligation."

**Commencement and Extent of Indemnifier's Liability**—The text of the Act leaves these matters undefined, and in fact the leading English authorities are comparatively recent. Accordingly the Calcutta High Court has reviewed and followed them without citing the Contract Act at all (z). It might be supposed that an indemnifier could not be called on till the indemnified had incurred actual loss, and

(v) L. Q. R. xxi 4, 5

(u) See the Transfer of Property Act IV of 1882, s 49, as to the rights of a transferee of immovable property under a fire policy.

(z) *Roberts v Crowe* (1872) L. R. 7 C. P. 629, 637, per Willes J. See also *Kellock v Enthoven* (1874) L. R. 9 Q. B. 241, Ex. Ch. Authorities of this class, however, are too much implicated with the special provisions of the English Companies Acts to be generally instructive for

the present purpose.

(y) *Moule v Garrett*, Ex. Ch. (1872) L. R. 7 Ex. 101, 104.

(z) *Osman Jamal & Sons Ltd v Gopal Purshattam* (1928) 56 Cal. 262, 118 I. C. 882, A. I. R. 1929 Cal. 203. It follows from that decision that s 125 must not be read as exhaustive, the English rules however, and therefore the possible Indian applications of them, go beyond the bounds of the Contract Act.

this was at one time said to be the rule of English Common Law But, according to the equitable principles which now prevail, "to indemnify does not merely mean to reimburse in respect of moneys paid, but (in accordance with its derivation) to save from loss in respect of the liability against which the indemnity has been given if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance" (a) Accordingly the existence of a clear enforceable claim—as under a judgment recovered—suffices to call the indemnifier's obligation into action and in general for the whole amount without regard to circumstances which may affect the amount ultimately paid by the indemnified or those who stand in his place But "the case is otherwise where the party giving the indemnity is concerned with the application of the money which he pays" (b) In the Calcutta case above referred to the P Company agreed to act as commission agents for D for the purchase and sale of a certain class of goods, D undertaking to indemnify the P Company against losses P Company made a purchase on behalf of D from one M of goods deliverable by instalments, but D failed to take delivery of the later instalments, whereby P suffered actual loss and also became entitled to damages for loss of commission Afterwards the P Company was ordered to be wound up and the official liquidator sued for the amount to be made up The result of an unqualified judgment for both (a) the sum due to M and (b) the loss of commission would be that M would get only a dividend in the liquidation and might still have a right of action for the balance against D Lord Williams J therefore said "The present case seems to me to fall in the category of those in which the party giving the indemnity is concerned with the application of the money which he pays" and gave judgment for the two sums (a) and (b) with a direction that (a) should be paid by the official liquidator to M in settlement of his claim (c)

(a) Kennedy I J in *Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617 638 fuller quotation of English authorities in Lord Williams J's judgment in the Calcutta case last cited

(b) Buckley L J in *Liverpool Mortgage*

*Insurance Co's Case* [1914] 2 Ch at p 633

(c) *Osman Jamal & Sons Ltd v Copal Purasulams* (1928) 60 Cal 267 273 118 I C 852 A 1 B 1929 Cal 608

**125.**—The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

Rights of indemnity holder when sued

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies,

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit,

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit

**Sub-s 1**—This section represents the English law, which is best summarised in the notes to *Lampleigh v Brathwait* in Smith's Leading Cases. As to sub s 1, "it is obvious that when a person has altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard indeed if when he came to claim the indemnity the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive," although the promisor was not party to it (d). This rule has been followed by the Indian Courts (e).

**Sub-s 2**—As to sub s 2, "in the case of contracts of indemnity,

(d) *Parler v Lewis* (1873) L R 10 Ch 1035, 1050 per Mellish LJ

(e) *Nallappa v Fridhachala* (1914) 37 Mad 270, 25 I C 888. And the pro

misee has a cause of action as soon as a decree is passed against him, *Chitrang Lal v Varma* (1919) 41 All 305, 51

L C 158

the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract, and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered" (f) But the costs must be such as would have been incurred by a prudent man (g)

The rule in England is settled to this effect, it is applied, indeed, to the case of a man who has failed to perform his contract through breach of a sub contract, if he sues the sub contractor, although there is no agreement to indemnify the contractor, and the question is regarded as being of the measure of damages only (h) The costs recoverable, in a proper case, are not confined to the taxed costs (i)

**Sub-s. 3**—As to sub s 3, "if a person has [expressly] agreed to indemnify another against a particular claim or particular demand, and an action is brought on that demand, he [the defendant] may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity (j)

**Rights of promisor.**—This section deals with the rights of a promisor in a contract of indemnity There is no provision in the Act for the rights of a promisor in such a contract The absence, however, of such a provision does not take away the rights which such a promisor has according to English law, and which are analogous to the rights of a surety declared in s 111 Those rights constitute an essential part of the law of indemnity, and they are of general application, as they are based on natural equity (k)

(f) *Pepin v Chunder Seekur Mookerjee* (1880) 5 Cal 811

(g) *Gopal Singh v Bhawan Prasad* (1888) 10 All 531

(h) *Hammond & Co v Bussy* (1887) 20 Q B Div 79, *Agius & Co v Great Western Colliery Co* [1899] 1 Q B 413, both in C A., and see pp 413, 414, above on s 73

(i) *Howard v Lovgrove* (1870) L R 6 Ex 43, *Venkatarangayya Ippa Iao v Varaprasada Iao* (1920) 43 Mal 838, 60 I C 161

(j) *Mellish I J*, 1 P 8 Ch at p 10, 9 (k) See *Maharana Shri Jasu singh Jaisingh v The Secretary of State for India* (1889) 14 Bom 299 303

126.—A “contract of guarantee” is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the “surety”, the person in respect of whose default the guarantee is given is called the “principal debtor,” and the person to whom the guarantee is given is called the “creditor.” A guarantee may be either oral or written.

The contract of guarantee supposes a principal debtor (l), the surety's obligation must be substantially dependent on a third person's default (m). A promise to be primarily and independently liable is not a guarantee, though it may be an indemnity (n). In England, however, this last distinction is material chiefly because a guarantee is within the Statute of Frauds, and therefore not actionable without such a “memorandum or note” as is required by s 4 of that Act, whereas the present section expressly declares that an oral guarantee is not less valid than a written one. As to the difference in principle between indemnity and suretyship, the Indian Act does not depart from English law. Contracts of suretyship require the concurrence of three persons, namely, the principal debtor, the creditor and the surety. The surety undertakes his obligation at the request express or implied of the principal debtor,” on the true construction of s 141 as well as s 126. Accordingly, if A enters into a contract with B, and C without any communication with B, undertakes for a consideration moving from A to indemnify A against any damage that may arise from a breach of B's obligation, this will not make C a surety for B, or give him a right of action in his own name against B in the event of B's default (o).

The mere transfer by a debtor of his property to a trustee for the benefit of his creditors, the trustee not undertaking any personal liability to the creditors, does not constitute the relation of principal and surety as between the debtor and the trustee (p).

(l) *Mounstephen v Lakeman* (1871) Q B 885  
 L R 7 Q B 196, 202 Ex Ch, affirmed (o) *Periamanna Marakkayar v Bansans*  
 in House of Lords, L R 7 H L 17 & Co (1925) 49 Mad 156, 172, 185, 95  
 (m) *Harburg India Rubber Comb Co v* I C 154, A I R 1926 Mad 544  
*Martin* [1902] 1 K B 778 C A (p) *Arunchellam Chetti v Subramanian*  
 (n) *Guild & Co v Conrad* [1894] 2 Chetti (1907) 30 Mad 235

the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract, and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered" (f) But the costs must be such as would have been incurred by a prudent man (g)

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(f) *Pepin v Chunder Seelur Mookerjee* (1880) 5 Cal 811

(g) *Gopal Singh v Bhawan Prasad* (1888) 10 All 531

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(j) Mellish L J, L R 8 Ch at p 1059  
(k) See *Maharana Shri Jasatsingji Fatesingji v The Secretary of State for India* (1889) 14 Bom 299, 303

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 (m) *Harbury Ind a Fuller Comb Co v* I C 154 A I P 1926 Mad 344  
*Mart n* [1902] 1 K B 228 C A (p) *Irunkelam Chetti v Subramanian*  
 (n) *Cn 11 I C v Cornet* [1924] 2 Chetti (1907) 30 Mad 235

A person may become a surety without the knowledge and consent of the principal debtor, but the only rights which he acquires in that case are those given by ss 140 and 141, and not those given by s 145 (q)

“Liability.”—By the word “liability” in this section is intended a liability which is enforceable at law, and if that liability does not exist, there cannot be a contract of guarantee. A surety, therefore, is not liable on a guarantee for the payment of a debt which is barred by the law of limitation (r)

127.—Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

*Illustrations*

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

**Consideration for a contract of guarantee.**—This is nothing but an application of the wider principle that in all cases of contract the really necessary element of consideration is the legal detriment incurred by the promisee at the promisor's request, and it is immaterial whether there is or is not any apparent benefit to the promisor (s) (see p 207, above)

Like any other contract, a contract of suretyship may be invalidated by total failure of the consideration, as where the consideration for an intended guarantee was postponing the sale of the debtor's goods,

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| <p>(q) <i>Muthu Raman v Chinna Vallayan</i> (1916) 39 Mad 965, 33 I C 508. As to execution of a decree against a surety for the judgment debtor under C P C, s 145, and the contract of the surety not being invalidated by an insufficient stamp, see <i>Joyma Beem v Easin Sarkar</i> (1926) 53 Cal 515, 95 I C 483, A I R 1926 Cal 877.</p> | <p>(r) <i>Manju Mahadev v Shivappa</i> (1918) 42 Bom 444, 46 I C 122.</p> <p>(s) <i>Sornalinga v Pachai Aickan</i> (1913) 38 Mad 680, 22 I C 1. Some benefit to the principal debtor is indispensable. <i>Pestonji v Bai Meherbai</i> (1928) 30 Bom L R 1407, 112 I C 740, A I R 1928 Bom 539.</p> |
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but the creditor was unable to stop the sale for want of the consent of other necessary parties (t) or where the consideration was withdrawal of a criminal prosecution against the debtor but the Court would not sanction the withdrawal the offence being non compoundable (u)

Where A advanced money to B on a bond hypothecating B's property and mentioning C as surety for any balance that might remain due after realisation of B's property and C was no party to the bond but signed a separate surety bond two days subsequent to the advance of the money, it was held that the subsequent surety bond was void for want of consideration (v) In this case it was said that illustration (c) could be good law only on the assumption that there was no privity between C and B and that C acted merely as a volunteer (w) but this appears to be exactly what the illustration says Again the mere fact that A lends money to B on the recommendation of C is no consideration for a subsequent promise by C to pay the money in default of B (x)

This section does not of course exclude the possibility of other kinds of consideration However lending money or supplying goods to the principal debtor and forbearing to sue him (y) are by far the commonest forms of consideration for a surety's contract In India forbearance to execute a decree against the debtor is also a common form (z)

**128.—**The liability of the surety is co extensive with that of the principal debtor, unless it is otherwise provided by the contract

*Illustration*

A guarantees to B the payment of a bill of exchange by C the acceptor The bill is dishonoured by C A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it [*Ackermann v Ehrensperger* (1846) 16 M & W 99 I entertain no doubt

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| <p>(t) <i>Cooper v Joel</i> (1859) 1 D F &amp; J 240</p> <p>(u) <i>Het Ram v Deo Prasad</i> (1881) 1 All W N 2</p> <p>(v) <i>Nanak Ram v Mehin Lal</i> (1877) 1 All 487</p> <p>(w) <i>Nanak Ram v Mehin Lal</i> (1877) 1 All at p 496 The remark occurs in the course of a somewhat captious depre-</p> | <p>ciation of the utility of illustrations in general which even suggests that the illustrations are not authoritative</p> <p>(x) <i>Muthukaruppa v Kathappudayan</i> (1914) 27 Mad L J 249 25 I C 796</p> <p>(y) As to this see <i>Coles v Pacl</i> (1869) L R 5 C P 65</p> <p>(z) <i>Narain Singh v Mata Prasad Singh</i> (1887) All W N 52</p> |
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A person may become a surety without the knowledge and consent of the principal debtor, but the only rights which he acquires in that case are those given by ss 140 and 141, and not those given by s 145 (g)

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Where A advanced money to B on a bond hypothecating B's property and mentioning C as surety for any balance that might remain due after realisation of B's property and C was no party to the bond but signed a separate surety bond two days subsequent to the advance of the money, it was held that the subsequent surety bond was void for want of consideration (t) In this case it was said that illustration (c) could be good law only on the assumption that there was no privity between C and B and that C acted merely as a volunteer (u) but this appears to be exactly what the illustration says Again the mere fact that A lends money to B on the recommendation of C is no consideration for a subsequent promise by C to pay the money in default of B (x)

This section does not of course exclude the possibility of other kinds of consideration However lending money or supplying goods to the principal debtor and forbearing to sue him (y) are by far the commonest forms of consideration for a surety's contract In India forbearance to execute a decree against the debtor is also a common form (\*)

128.—The liability of the surety is co extensive with that of the principal debtor unless it is otherwise provided by the contract

Surety's liability

Illustration

A guarantees to B the payment of a bill of exchange by C the acceptor The bill is honoured by C A is liable to pay the amount of the bill together with any interest and charges which may have become due on it [Akersmann v Ehrenspurger (1846) 16 M & W 90] I entertain no doubt

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## THE INDIAN CONTRACT ACT

that a party who guarantees the payment of a bill is liable for all that the principal would be liable for,' per Pollock, C B , at p 103 ]

### *Additional Illustrations*

[A guarantees to B the payment of rent becoming due from B to C B fails to pay the rent A is liable for the rent, but not for interest on the rent, unless the bond contained some such words as ' with interest thereon '

*Maharaja of Benares v Har Narain Singh* (1906) 28 All 25

Z writes to A , who holds B 's promissory note, that B will pay the principal and interest within three months " if he does not so pay, I shall have the note assigned to my name and pay you the principal and interest

This is not a special contract of guarantee, but an ordinary contract of suretyship in which terms implied by law (see s 141, p 498 below) are expressed , accordingly both Z and B are liable to A *Chokalinga Chettiar v Dandayuthapani Chettiar*, 113 I C 337 , A I R 1928 Mad 1262 ]

**Proof of surety's liability.**—The liability must be proved against the surety in the same way as against the principal debtor A judgment or award against the principal is not admissible as against the surety without a special agreement to that effect " In an action against a surety the amount of the damage cannot be proved by any admissions of the principal " (b) The present section is merely a re enactment of the Common Law (c)

**Liability for whole or part of debt.**—There is an important distinction to be observed as to guarantees limited in amount A man may make himself a surety, " with a limit on the amount of his liability, for the whole of a debt exceeding that limit " , and a guarantee of limited amount for an ascertained debt is presumed to be a guarantee for the whole

But " where the surety has given a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is as between the surety and the creditor to be construed, both at law and in equity, as applicable to a part only of the debt co extensive with the amount of his guarantee, and thus upon the ground, at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety " (d) Evidence of contrary intention is of course admissible in either case But, in the absence of such evidence, the surety who has guaranteed the whole debt with a limit of his liability

(b) *Ex parte Young* (1881) 16 Ch Div 65, 671

Bom 647 650

(d) *Ellis v Emanuel* (1876) 11 C Div

(c) *Hajaramal v Krishnarao* (1881) 5 157, 163, *Cur per Blackburn J*

does not acquire any rights of subrogation or contribution (see ss 110, 141, 146, pp 496, 498, 507, below) until he has paid up to that limit, whereas the guarantor of a floating balance up to a limited amount is deemed to be surety only for that part of the debt, and is entitled to the benefit, in rateable proportion, of any dividends paid by the estate of the principal debtor

Thus where A guaranteed Z against trade debts to be contracted by M "as a running balance of account to any amount not exceeding £400" and M became indebted to Z for £625 and made a composition with his creditors for 8s 7d in the pound, leaving a balance of £365 due to Z, it was held that, as between A and Z, A was entitled to deduct from that balance the amount of the dividend paid upon £400 the maximum of A's guarantee and was liable to Z only for the difference. For the guarantee was on its true construction only a guarantee for £400, part of M's entire debt to Z, not a guarantee for an unknown amount with liability limited to £400 and, that being so, the dividend paid by M was to be applied rateably in reduction of every part of the debt and the liability of A on the part for which he had undertaken was diminished accordingly (e). In a later case, held to be indistinguishable from this it was said 'If a person guarantees a limited portion of a debt, all the authorities show that if he pays that portion he has in respect of it all the rights of a creditor. The question is whether the guarantor means 'I will be liable for £250 of the amount which A B shall owe you' or 'I will be liable for the amount which A B shall owe you subject to this limitation that I shall not be called upon to pay more than £250. It is true that a surety may enter into an obligation to be liable to a limited amount for the ultimate balance remaining after all moneys obtainable from other sources have been applied in reduction of the debt. But such an intention ought to be clearly expressed (f).

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety, though the principal has not been sued (g).

(e) *Bardwell v Lydall* (1831) 7 Bing 168

489, 33 R R 540

(g) *Sanlana v Virupakshapa* (1883)

(f) *Hobson v Bass* (1871) L R 6 Ch

7 Bom 146 *Lachman v Bapu* (1869)

792 794 (Lord Hatherley) cp 1 Ex Div

6 Bom H C A C 241, *Totalit v*

**Surety's liability where original contract is void or voidable.**—This section only explains the *quantum* of a surety's obligation when the terms of the contract do not limit it, as they often do. It does not follow, conversely, that a surety can never be liable when the principal debtor cannot be held liable. Thus a surety is not discharged from liability by the mere fact that the contract between the principal debtor and creditor was voidable at the option of the former, and was avoided by the former. And where the original agreement is void, as in the case of a minor's contract in India, the surety is liable as a principal debtor; for in such a case the contract of the so-called surety is not a collateral, but a principal, contract (*h*).

In the case of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor, the loss to be recoverable in a suit against the guarantor must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement (*i*).

**Administration and surety bonds.**—The liability of sureties under an administration bond does not depend on the validity or invalidity of the grant. Nor is the bond void merely because administration was obtained by misrepresentations of which neither the Court nor the sureties were aware (*j*). The same principle applies to surety bonds passed under the Guardian and Wards Act (*k*). See notes to s. 20, p. 137, above.

**Limitation.**—This section must be read together with the Limitation Act, and not so as to nullify its provision limiting the time within which a suit must be brought after the accrual of a cause of action.

*Kurusingal* (1869) 4 M. H. C. 190; *Karim Bakhsh v. Bithul Das* (1882) All. W. N. 132; *Inayutullah v. Rani* (1886) All. W. N. 306; *Surdet Singh v. Gujjar Sing* (1919) P. R. 93; *Depak Datt Chaudhars v. Secy. of State*, 118 I. C. 443; A. I. R. 1929 Lah. 393.

(*h*) *Kashiba v. Shripal* (1891) 10 Bom. 697; *Sohan Lal v. Puran Singh* (1916) Punj. Rec. no. 54, p. 165; 35 I. C. 537; *Indar Singh v. Thakar Singh* (1921) 2 Lah. 207; 63 I. C. 387.

(*i*) *Sri Kishen v. The Secretary of State for India in Council* (1885) 12 Cal. 143. This was a case on the construction of an undertaking in the nature of a "fidelity guarantee" on very peculiar facts; the Contract Act is not referred to at all.

(*j*) *Debendra Nath Dutt v. Administrator-General of Bengal* (1900) 33 Cal. 713; (1908) 35 Cal. 955; L. R. 35 I. A. 109 (P. C.).

(*k*) *Sarat Chandra Roy v. Rajons Mohan Roy* (1908) 12 C. W. N. 481.

The payment of interest therefore, by a debtor before the expiration of the period of limitation does not give a fresh starting point for limitation against the surety under s 20 of the Limitation Act even in the absence of a prohibition by the surety against the payment of interest by the debtor on his account. Payment of interest by the debtor could not be regarded as made by a person liable to pay the surety's debt, nor can the surety be, for the purpose of that section, considered the agent of the principal duly authorised to pay the interest (l). "The fact that the interest was paid with the knowledge and consent of the surety and even at his request, makes no difference unless the circumstances could be said to render the payment one on behalf of the surety" (m).

See also the commentary on s 131, p 186, below.

129.—A guarantee which extends to a series of transactions is called a "continuing guarantee."

\* Continuing guarantee "

*Illustrations*

(a) A, in consideration that B will employ C in collecting the rents of B's zamindari, promises B to be responsible, to the amount of 5 000 rupees, for the due collection and payment by C of those rents. This is a continuing guarantee. [See *Durga Prasad Chowdhury v Durga Prasad Roy* (1927) 53 Cal 154, 109 I C 72, A I R 1928 Cal 201, where this illustration is relied on.]

(b) A guarantees payment to B, a tea dealer, to the amount of £100, for any tea he may, from time to time, supply to C. B supplies C with tea to above the value of £100, and C pays B for it. Afterwards B supplies C with tea to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100. [Facts simplified from *Hood v Priestner* (1867) L R 2 Ex 66, 282.]

(c) A guarantees payment to B of the price of five sacks of flour, to be delivered by B to C, and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C which C does not pay for. The guarantee given by A was not a continuing guarantee and accordingly he is not liable for the price of the four sacks. [*Kay v Groves* (1829) 6 Bin 276.]

**Continuing guarantee**—Whether in a particular case a guarantee is continuing or not is a question of the intention of the parties, "as expressed by the language they have employed, understanding it fairly in the sense in which it is used, and this intention is best ascertained by looking to the relative position of the parties at the time the instrument is written" (n). Surrounding circumstances must be looked to

(l) *Gopal Datt v Gopal Bih Sonu* (1903) 44 Cal 978 993, 39 I C 705  
28 Bom 248

(n) *Bohll C J, Coles v Pack* (1860)

(m) *Brayendra Kishore v Hindustan Co operative Insurance Society Ltd* (1917) L R 5 C P 65, 70

"to see what was the subject matter which the parties had in their contemplation when the guarantee was given" (o) A guarantee in this form "I, M, will be answerable for £50 sterling that Y, butcher, may buy H," was held to be a continuing guarantee to the extent of £50 when it appeared from the circumstances that the parties contemplated a continuing supply of stock to Y in the way of his trade The Court has power "not to alter the language, but to fill up the instrument where it is silent, and to apply it to the subject matter to which the parties intended it to be applied" (p) In construing the language of the parties the whole of their expressions must be looked to, not merely the operative words Thus the following words were held to show that a guarantee, which otherwise might have been confined to a single transaction, was intended to be continuing "Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure for any account he may have with you, and when to the contrary we will write you" (q)

B became surety under bond to Government for the treasurer of a collectorate The collector yearly examined the accounts and struck a balance which he certified to be correct B on each occasion executed a new bond, but the old bonds were not cancelled or given up On subsequent inquiry, the treasurer was discovered to have embezzled money during each year It was held that, on such discoveries being made, B was still liable under the old bonds, there having been no novation (r)

A guarantee of the fidelity of a person appointed to a place of trust in a bank is not a continuing guarantee (s) Nor is a guarantee for the payment by instalments of a sum certain within a definite time (t)

### 130.—A continuing guarantee may at any time be

revoked by the surety, as to future transactions, by notice to the creditor

(o) *Willes J. Heffeld v. Mellors* (1869)  
I R 4 C P 597 599

(t) *Ib. and per Montague Smith J. at p. 601*

(q) *Nottingham v. Hyde Co. v. Bottrill*  
(1873) I I 8 C P 604

(r) *Lal's Finslihar v. Government of Bengal* (1872) 9 B I P 704 14 M  
I A 56

(s) *Sen v. Bank of Bengal* (1900) I I 47 I A 104, 58 I C 1 *quære*, whether in the particular case there was any guarantee at all see I R 47 I A at p. 170

(t) *Ilagranlis v. Secy of State* (1900)  
28 B I R 662, 96 I C 248 A I I 1900 Bom 465

*Illustrations*

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months the due payment of all such bills to the extent of 5 000 rupees. B discounts bills for C to the extent of 2 000 rupees. Afterwards at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2 000 rupees on default of C.

(b) A guarantees to B to the extent of 10 000 rupees that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bills. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

**Future transactions**—The words "future transactions" must be taken to imply that the operation of this section is confined to cases where a series of distinct and separate transactions is contemplated. It is otherwise in the case of an entire consideration. "Where a continuing relationship is constituted on the faith of a guarantee the guarantee cannot be annulled during the continuance of that relationship", and as the surety could not determine it himself by notice so his death does not relieve his estate from liability, the nature of the transaction implies a contract to the contrary under s 131. The father of a person admitted as an underwriting member of Lloyd's (a position from which he could not be removed except for certain causes specified in the rules of the association) gave a guarantee to Lloyd's "for all his engagements in that capacity", it was held that the guarantee was not confined to transactions within the society, that it was not revocable while the son continued to be an underwriting member, and that the guarantor's death did not revoke it (u).

But a material change in what we may call the guaranteed situation may justify a revocation. Thus, in the common case of a continuing guarantee for a servant's honesty, proved dishonesty on the servant's part entitles the surety to say 'After this you must employ such a man, if you will, at your own peril' (t).

Illustration (a) was evidently founded on the case, fairly recent at

(u) *Lloyd v Harper* (1880) 18 Ch Div 290 (Fry J) (see his statement of the principle at p 306 quoted above) and C A.

(t) *Phillips v Forall* (1872) L R 7 Q B 666, 677, 681, following on this point a dictum in *Burgess v Ere* (1872)

L R 13 Eq 450 458, but this is not the only ground for the decision. See s 139 p 494, below. The last mentioned case, turning as it does partly on the peculiar rules as to instruments under seal, is not in itself of much value for Indian purposes.

the time, of *Offer & Duties* (w) The truth is as the judgment of the Court explains that A's guarantee is in such circumstances nothing but an offer until B has acted upon it by discounting a bill, for if B does not promise to discount C's bills, there is no immediate legal detriment to B. When B does discount a bill, A's offer becomes a promise to that extent and so from time to time. The standing offer is therefore revocable by A at any time. "This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendant, or to the detriment of himself. But, until the condition has been at least in part fulfilled the defendants have the power of revoking it. We consider each discount is a separate transaction, creating a liability on the defendant till it is repud and after repayment leaving the promise to have the same operation that it had before any discount was made and no more. Accordingly we have here to do not with any peculiar feature in the relations of principal and surety, but with an application of the general Common Law doctrine of consideration.

**Notice**—The mere denial of liability by the surety in a previous suit instituted by the creditor against him and the principal does not operate as a notice under this section (x).

**Sureties for guardians and administrators**—The High Court of Bombay (y) holds that this section does not apply to a surety bond required by the Court on the appointment of a guardian of the property of a minor. The surety in that case applied to the Court to be released from his obligation as such on account of the guardian's maladministration of the minor's estate but the Court refused the application stating that "the very object of requiring such security was to guarantee the minor against such misconduct or mismanagement on the part of the guardian." The Calcutta High Court, however, has held that this section applies to a surety bond imposed under the Probate and Administration Act V of 1881 and that a surety for the administrator of an estate can as to future transaction by giving notice, be released from his obligation as surety on account of maladministration of the estate.

(w) (1862) 12 C. B. & S. 48 133  
R. P. 491 Finch Sel. Cas. 5<sup>th</sup> ed. see  
the judgment of Baggallay J. in *Morrell*  
v. C. (1877) 7 Ch. Div. 151 174

(x) *Palan'kas v. Das Thurs* (1903) 2<sup>nd</sup>  
Bom. 415

(y) *Pai Soma v. Ch. Lala Iswardas*  
(1904) 10 Bom. 245

by the administrator (2) As to the Bombay case it was said that, though it was similar in principle, the surety there had a remedy inasmuch as he might have applied to the Court as the next friend of the minor for the discharge of the guardian, while in the Calcutta case the surety was absolutely without remedy, for, being neither a legatee nor a creditor, he could not take any steps to protect either the estate or himself by instituting administration proceedings. On the other hand the Madras High Court has held, following the principle of the Bombay decision, that this section does not apply to surety bonds passed under the Probate and Administration Act. "If the section applies, the 'creditor' would presumably be the obligee under the bond, i.e., the Judge or Registrar, and the surety could, without any action or any other legal proceeding, put an end to his liability by giving notice to the Judge or Registrar. This is contrary to established practice and might lead to great inconvenience" (a). However this may be, a surety accepted by the Court for a receiver appointed under a mortgage decree cannot discharge himself by notice to the decree holder given without the consent of the Court (b).

**131.**—The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

Revocation of continuing guarantee by surety's death

**"Contract to the contrary"**—The English rule appears to be that where there is a guarantee subject to revocation by notice, and the surety dies without having revoked it notice of his death to the creditor (or at all events of his death leaving a will) operates as a revocation (c). But this does not govern the construction of the present section (d).

(2) *Raj Narain v. Ful Kumari Devi* (1901) 29 Cal 68

(a) *Subroya Chetty v. Ragammall* (1900) 28 Mad 161, relying principally on *Re Starb* (1866) L R 1 P & M 76 to which it was observed the attention of the Calcutta Court was not drawn. In the Calcutta case the surety proceeded by an application in the probate proceedings and in the Madras case a regular suit. The Madras Court said that the surety was not entitled to relief in either case.

(b) *Mahomed Ali Manoojee v. Houseson Bros* (1925) 30 C W N 266 98 I C 506, A I R 1926 P C 32

(c) *Coulthart v. Clementson* (1879) 5 Q B D 42 judgment on further consideration by Bowen J. See, however, [1895] 1 Ch at p 577, and per Cotton L.J., *Beckett v. Addyman* (1882) 9 Q B D 783 792

(d) *Durga Priya Chowdhury v. Durga Pada Roy* (1927) 55 Cal 154, 159, 100 I C 752, A I R 1928 Cal 204

An express provision that a guarantor or his representatives may determine the guarantee by notice is an example of such a contract to the contrary as this section contemplates, in such a case mere notice of the death will not be enough (e)

It is by no means clear that the present section states the rule rather than an exception, at any rate the 'contract to the contrary' need not be in express term

Where A. guaranteed payment of rent to a lessor and B. in turn promised A. to be responsible for all rent that might not be paid by the lessee, and which he might under his guarantee become liable to pay, it was held that assuming that the latter transaction was a continuing guarantee, it was not revoked by B's death and that B's representative was liable to A. for rent paid by A. to the lessor after B's death on failure of the lessee to pay the same (f)

Compare s. 202 p. 595 below as to the determination of an agent's authority

### 132.—Where two persons contract with a third person

Liability of two persons, primarily liable, not affected by arrangements between them that one shall be surety on and for the default of the other. To undertake a certain liability and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence

#### Illustration

A and B make a joint and several promissory note to C. A makes it in fact as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B is no answer to a suit by C. against A. upon the note

**Joint debtors and suretyship**—This rule is elementary so far as it goes, but it is material to observe that it does not extend beyond the

(e) *Re Smead* [1893] 1 Ch. 572. For earlier and more or less conflicting authorities—see in course of law and equity cases *Deane v. Morgan* (1862) 1 H. & C. 249; *Harris v. Foxwell* (1873) L. R. 8 Ch. 566; *Uthmaniyah v. Uthmaniyah* (1888) 43 All. 132; *Ch. 15*.  
(f) *G. v. G. & P. v. P.* (1888) 10 All. 531

literal terms. Where one of two joint debtors is to the knowledge of the creditor, in fact a surety for the other as between themselves, his immediate liability to the creditor is not qualified, but he is entitled to the rights of a surety under the following sections 133, 134, 135.

When two or more persons bound as full debtors arrange either at the time when the debt was contracted or subsequently that *inter se* one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors. That appears to me to be the law as settled by the judgments of this House in *Oakeley v Pasheller* (g) and *Overend, Gurney & Co v Oriental Financial Corporation* (h). This includes the case where one member of a firm retires and another continues the business and agrees to indemnify the outgoing partner there the retired partner has the rights of a surety (as to discharge by giving time and the like) as against a creditor having notice of the dissolution and its terms (i).

There need not be any assent by the creditor much less a new agreement to accept the secondary debtor in the relation of surety (j).

In two Indian cases both decided under the English law, the opinion was expressed that if the creditor with knowledge of the contract between the co-debtors does any of the acts specified in ss 133, 134 or 135 the legal consequence of which is the discharge of the surety, the debtor, who is in fact a surety will thereby be discharged from liability (k).

The provisions of this section do not apply where the liability undertaken is not the same. A party who accepts bills of exchange for the accommodation of another is not precluded by this section from pleading that he was an accommodation acceptor only. The liability undertaken by the acceptor and drawer of a bill is in no sense a joint liability, and though they each contract to pay the same sum of money

(g) (1836) 4 Cl & F 207, 42 R R 1 639

(h) (1874) L R 7 H L 348 per Lord Watson, *Rouse v Bradford Banking Co* [1894] A C 586, 598. In *Swire v Redman* (1876) 1 Q B D 536 *Oakeley v Pasheller* was not rightly understood. See per Lord Herschell, [1894] A C at p 591.

(i) *Goldfarb v Bartlett* [1920] 1 K B

(j) *Wythes v Labouchere* (1858) 3 De G & J 593 599 121 R R 238 242

(k) See *Punchanun Ghose v Dalj* (1875) 15 B L R 331 (the judgment refers at its very end to s 132 of the Act) *Haryiban Das v Bhagwan Das* (1871) 7 B L R 535

they contract severally in different ways, and subject to different conditions (l) See Negotiable Instruments Act, 1881, ss 37, 38

**133.**—Any variance, made without the surety's consent in the terms of the contract between the principal [sic] and the creditor, discharges the surety as to transactions subsequent to the variance

Discharge of  
surety by variance  
in terms of con-  
tract

*Illustrations*

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one fourth of the losses on over-

L C 226, 88 R R 60 ]

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C and of which the duties are defined by an Act of the Legislature. By a subsequent Act the nature of the office is materially altered. Afterwards B misconducts himself. A is discharged by the change from future liability under his guarantee though the misconduct of B is in respect of a duty not affected by the later Act. [*Oswald v Mayor of Berwick* (1856) 5 H L C 856 (the rule of law was undisputed and the only question considered was whether there had been a material alteration in the office), *Pybus v Gibb* (1856) 6 E & B 902, 911, also treating the rule as settled.]

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards without A's knowledge or consent C and B agree that B should be paid by a commission on the goods sold by him, and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3 000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payment shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5 000 rupees on the 1st March. A guarantees repayment. C pays the 5 000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied inasmuch as C might sue B for the money before the 1st March. [*Bonser v Cox* (1811-44) 4 Beav 379, 6 Beav 110, 50 R R 113.]

**Variation of contract between creditor and principal**—This is a rule of long standing, thus expressed by Lord Cottenham: "Any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him,

(l) *Pogose v Bank of Bengal* (1877) 3 Cal 174, 184. *Co v Oriental Financial Corporation* (1874) L. R. 7 H. L. 348.  
*Op Overend, Gurney &*

or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety " (m)

Again, it was laid down a generation later by a Judicial Committee. " A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co surety in a manner at variance with the contract the performance of which the surety has guaranteed " (n) Moreover, as the case now cited shows, the more special provisions of the two following sections are deductions from the same principle

" The party who is surety for another for the performance of an engagement can only be called upon to guarantee the performance of that engagement when the engagement is carried into complete, literal, and strict effect He enters into a particular and specific contract, and that contract alone he is bound to perform " (o)

The only qualification (for it is not an exception) to the generality of the rule is that, where a guarantee is for the performance of several and distinct contracts or duties, a change in one of those contracts or duties will not affect the surety's liability as to the rest (p) The intention of a " settlement " contract, for repurchase of goods by the seller from the buyer, is not that the original contract shall be discharged but that the two contracts shall stand together (q), accordingly, a contract of re sale to the vendor does not discharge a surety for his original contract (r) A stipulation in a contract of guarantee whereby the surety purports to waive all his rights, legal, equitable, statutory or otherwise, which may be inconsistent with the guarantee, will not deprive him of his right to discharge under this section (s)

A somewhat peculiar case is the following —N owed £3,400 to P and was about to dispose of his business to a company to be formed

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|---|--|
| (m) 3 H L C at pp 238, 239 The law is the same in Scotland <i>ibid</i>  | <i>Vamouys</i> (1919) 46 Cal 534, 542, 541 C 285   |
| (n) <i>Ward v National Bank of New Zealand</i> (1883) 8 App Ca 755, 763   | (r) <i>Uderam v Shreebajan</i> (1920) 22 Bom L R 711, 58 I C 272   |
| (o) Lord Lyndhurst LC, <i>Ponser v Cox</i> (1844) 13 L J Ch 260, 55 L R 120   | (s) <i>Chitgupp &amp; Co v Banayal Aashinash</i> (1921) 45 Bom 157, 58 I C 184   |
| (p) <i>Skillett v. Fletcher</i> (1866-67) L R 1 C P 217, 2 C P 469, <i>Croydon Gas Co v Dickinson</i> (1876) 2 C P Div 46 | <i>Quere</i> , as to the suggestion there made that nothing short of a specific consent to the particular variation will suffice |
| (q) <i>Uttam Chand Saligram v Jera</i>  |  |

It was agreed between N and P that N should pay off the debt within a time named, and in the meantime transfer to P shares in the company of the nominal value of £6,000, and redeem them at par within twelve months, and (among other terms) N's book debts should be collected by one V and divided equally between P and a certain other creditor P's share to be applied towards redemption of the shares above mentioned. E guaranteed the redemption of the shares. Some months later P released his interest in the book debts to N. Later N failed to deliver the shares, as promised. This was a variance from the original contract which discharged E, the surety. "The surety at the time he entered into the suretyship had a right to have these book debts appropriated to reduce the principal debt, and that right he has been deprived of by the act of the creditor in releasing the book debts. The surety is entitled to remain in the position in which he was at the time when the contract was entered into" (t).

Where a company was entitled under its articles to forfeit shares for default in paying up unpaid instalments and by another article the owners of forfeited shares were made immediately liable for the amount of the calls due and incidental expenses with interest until payment, the company's election to forfeit shares was held to discharge sureties who had guaranteed payment of the calls for a new and more onerous obligation was imposed on the debtor and the sureties were deprived of their right of lien on the shares (u).

Attempts have been made to confine the rule to the cases where the variance materially affects the surety's interest, and to treat it as a question in each case whether the change is material for this purpose. Only one reported case appears to countenance this view (v), and it is clearly inconsistent with later and higher authority. There may be "cases where it is without inquiry evident that the alteration is unsubstantial or that it cannot be otherwise than beneficial to the surety," and in such cases "the surety may not be discharged, but" if it is not self-evident that the alteration is unsubstantial, or one which cannot be

(t) *Polak v Everett* (1876) 1 Q B D 669 per Blackburn J at p 674 (where the words 'to the person collecting them' seem to be a slip) per Mellor J, at p 677. Lord Blackburn disliked the rule and doubted its wisdom (p 674), but admitted that it was beyond discussion.

The C A affirmed the decision of the Q B D for the same reasons without delivering any formal judgment (p 678).

(u) *Le Dracien and Le Drac* [1927] 1 Ch 176.

(v) *Sanderson v Aston* (1873) L R 8 Ex 73 judgment on second plea.

prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration and that if he has not so consented he will be discharged" (w) The principle has been applied by the Court of Appeal, though with some reluctance in the circumstances where several persons, being in fact the individual members of a private company, deposited the title deeds of properties belonging to them respectively with a person who was practically financing the company, as security for the company's debts to him this person allowed one of the depositors to have back her title deeds in order to raise money for a purpose of her own this was held to discharge the other depositors (x) Accordingly we can see no ground for the suggestion that the present section goes beyond English law

Where by the terms of a consent decree for the payment by instalments of a sum of money with interest passed against certain defendants as principal debtors and against other defendants as sureties, it was stipulated that on default of payment of any one instalment the decree holder should sell the properties of the principal debtors for the whole amount remaining due under the decree and the liability of the sureties was limited to the deficiency, it was held by the Judicial Committee that the omission of the decree holder to sell the properties until after several years after the first order for sale for the purpose of increasing the interest payable to him under the decree discharged the sureties to the extent of the interest that had accrued due after the date of that order (y) The judgment proceeded on the ground that the conduct of the decree holder in delaying the sale has the result of 'laying an additional burden upon the sureties

A becomes surety to C for payment of rent by B under a lease Afterwards B and C contract without A's consent that B will pay

(w) *Holme v Brunskill* (1878) 3 Q B Div 495 505 per Cotton and Thesiger LJJ followed *Bolton v Salmon* [1891] 2 Ch 48 54, *Noor Mahomed Lallam v Dhaniram*, 96 I C 234 A I R 1926 Sind 105

(x) *Smith v Wood* [1929] 1 Ch 14 The substantial question was whether the depositors were co sureties at all

(y) *Ramanund v Choudhry Soonder Narain* (1878) 4 Cal 331

## THE INDIAN CONTRACT ACT.

rent at a higher rate A, is discharged from his suretyship in respect of arrears of rent accruing subsequent to such variance (2)

A owes Rs 1,300 to B C, afterwards requests B to forbear to sue A for a week, and deposits Rs 1,300 with B as security B agrees to forbear as requested A fails to pay within a week B afterwards obtains from A a promissory note payable on demand for Rs 1,800 C is discharged from the suretyship, and is entitled to recover back his deposit from B (a)

An attempted variance which is inoperative, as being against the local law applicable as between the creditor and the principal debtor, will not discharge the surety A Canadian banker's loan and interest were guaranteed, the bank increased the rate of interest from 7 to 8 per cent, 7 per cent being the highest the bank could legally charge in Canada, the guarantors remained bound for principal and lawful interest (b)

In a modern case on appeal from the Supreme Court of New Zealand the judgment of the Judicial Committee (c) summed up the doctrine in connection with its principal applications It is thought useful to quote this statement as a whole, although it involves the repetition of one or two references already given

In pursuance of this principle it has been held that a surety is discharged by giving time to the principal even though the surety may not be injured and may even be benefited thereby The reason of this rule is thus given by Lord Eldon in the case of *Samuel v Hough* (d) 'The surety is discharged for this reason because the creditor in so giving time to the surety has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not It has been truly stated that the renewal of bills might have been for the benefit of the surety, but the law has said that the surety shall be the judge of that . . . The creditor has no right it is against the faith of his contract to give time to the principal even though manifestly for the benefit of the surety, without the consent of the surety'

A recent decision of the Court of Appeal, in *Holme v Brunskill* (e) is based on the same principle The defendant gave the plaintiff a bond that the tenant of his farm should on the expiration of his tenancy redeliver a

(\*) *Kha'un Bibi v Abdullah* (1880) 3 All 9 Where the thing guaranteed is not the payment of rent but something collateral to be due by the tenant e.g., redelivery of farm stock in good condition at the end of the term, a variation of the terms of the tenancy may discharge the surety even though it actually diminishes the rent payable *Holme v Brunskill*

(1877) 3 Q B Div 495

(a) *Creech v Seth and Seth* (1887) All W N 136

(b) *Fyfe v National Crown Bank* [1918] A C 903

(c) Delivered by Sir R. Collier, afterwards Lord Monckswell

(d) (1817) 3 Mer 272, 17 P P 91

(e) 3 Q B D 495

flock of sheep on the farm in good order and condition. By an agreement between the plaintiff and the tenant the tenant gave up a field on the farm, and held the remainder at a reduced rental. The jury, at the trial having found that the surety was not prejudiced by this agreement, it was held by Lord Justices Cotton and Thesiger (Lord Justice Brett dissenting) that, notwithstanding the finding of the jury, the surety was released.

"Lord Justice Cotton observes: 'The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, and one which cannot be prejudicial to the surety, the surety may not be discharged, yet that if it is not self-evident that the alteration is unsubstantial, or one that cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry into the effect of the alteration.' The *ratio decidendi* is thus stated: 'The plaintiff attempts to substitute for the contract that the flock shall be given up in good condition with the farm as then demised a contract that it should be delivered up in like condition with a farm of different extent. The surety ought to have been asked to decide whether he would assent to the variation. He never did assent, and in my opinion was discharged from liability.' To the same effect is *Polak v. Freerell* (f), where, there being a stipulation that half the book debts of the debtor should, under certain circumstances, be made over to the creditor, he released the book debts, and accepted in lieu thereof a supposed equivalent. The ground of the decision is thus stated by Quain J.: 'The contract of the surety should not be altered without his consent, and the creditor should not undertake to alter the contract and then say, Although the contract has been altered, and I have put it out of my power to carry it out by a voluntary act, I now offer you an equivalent.' " (g)

**134.—**The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Discharge of  
surety by release  
or discharge of  
principal debtor

## Illustrations

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B and afterwards B becomes embarrassed, and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land, and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a

(f) 1 Q. B. D. 669

(g) *Ward v. National Bank of New Zealand* (1883) 8 App. Cas. 755, 763

stipulated time, B supplying the necessary timber C guarantees A's performance of the contract B omits to supply the timber C is discharged from his suretyship

**Creditor's discharge of principal debtor.**—"The law upon this subject is clear and well settled If the creditor, without the consent of the surety, by his own act destroy the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged " (h)

But it is to be observed with regard both to this and to the following section, that if the creditor expressly reserves his remedies against the surety or generally his securities and remedies against persons other than the principal debtor, the surety is not discharged In England this is as well settled as the main rule, and it is really quite consistent with the terms of the present section For the reason of the doctrine is that a nominal release of the debtor, subject to a reservation of securities is not a release destroying the debt, but operates only as a covenant not to sue the principal debtor, who remains, however, liable to indemnify the surety (i) The surety's right to indemnity against the principal debtor is a necessary result of such a reservation (j) Like effects may be produced without an express reservation "Where the whole debt has not been discharged, but the debt as to part remains undischarged, but the principal debtor cannot be pursued by the creditor for the balance, the surety may by apt words be left liable although the principal debtor has as regards such balance been released as between himself and the creditor " In the case referred to the surety had executed mortgages to a bank to secure the overdraft of a firm composed of his own two sons, and each deed contained a declaration that the bank might "without affecting their rights herein" compound or make arrangements with the debtors Under a scheme of arrangement made by the debtors with their creditors, including the bank, the Court of Appeal held that the mortgage security was released only for a certain portion of the debt as to which there was an express

(h) Kelly CB, in *Cragoe v Jones* (1873) L R 8 1 x 81, 82

(i) *Bateson v Gosling* (1871) L R 7 C P 9 where former authorities are critically reviewed by Willes J, *Green v Hyatt* (1869) L R 4 Ch 201 following

*Webb v Heintz* (1857) 3 K & J 439 442, *Murugappa Mulialiar v Munusami*

*Mudali* (1910) 38 M L J 131 511 C 728

(j) *Close v Close* (1857) 4 D M G 176,

and complete substitution of a new security (*k*) A creditor, without ceasing to hold the principal debtor liable, prefers to sue the more solvent of two sureties for the debt this, still more obviously, does not discharge the other surety (*l*)

But where there is a final and full release of the principal debtor by a complete novation or otherwise, "the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone" Acceptance of a new debtor instead of the old one puts an end to the liability of a surety for the old debt (*m*)

The importance of the English doctrine as to reservation of rights is, however, considerably diminished by the operation of s 138 (p 493, below)

**Discharge by operation of law.**—A discharge of the principal debtor in bankruptcy does not operate as a discharge of the sureties (*n*)

**"Act or omission of the creditor."**—The acts or omissions contemplated by this section may be those referred to in ss 39, 53, 54, 55, 63, and 67 (*ante*) The facts of illustration (c) to this section are similar to those of illustration (b) to s 54 (p 320, above) If the principal debtor is discharged from his obligation by reason of any acts or omissions specified in those sections, the liability of the surety will determine But the act or omission must be one of which the legal consequence is the discharge of the principal debtor The mere omission therefore of a creditor in a suit by him against a principal debtor and a surety to effect service of summons on the principal debtor, does not discharge the surety for the principal debtor is not thereby discharged from liability to the creditor The only consequence of such an omission is to enable the Court to dismiss the suit as against the principal debtor after the expiration of one year under s 99A of the Code of Civil Procedure 1882 [new Code of 1908 O 9 r 5],

(*k*) *Perry v Nat Procr Bank of England* [1910] 1 Ch 461, per Buckley L J, at p 474, distinguishing the *Commercial Bank of Tasmania's* case (note (*m*))

(*l*) *Bhagvandas v Secy of State* (1920) 28 B L R 662, 96 I C 248 A I R

1926 Bom 465

(*m*) *Commercial Bank of Tasmania v Jones* [1893] A C 313, 316

(*n*) *Morice v Simla Bank Corporation*, 111 (1878) Punj Rec No 2

but the plaintiff would still be at liberty to bring a fresh suit against the principal debtor under the provisions of that section (a)

**Creditor's omission to sue principal within limitation period**—The question whether a surety is discharged when a creditor allows his remedy against the principal debtor to become barred by limitation may be considered at this stage. On this point there are two opposite views taken by the Indian High Courts. On the one hand, it has been held by the High Courts of Bombay (p) Calcutta (q) Madras (r) and Lahore (s) that the surety is not under such circumstances discharged from liability to the creditor, the High Court of Allahabad (t) on the other hand, has held that the surety is discharged. The conflict arises in great part from the provisions of s. 137 (p. 192 below) and especially the words "mere forbearance" occurring in that section. It is concluded by the Bombay and Calcutta High Courts that if s. 134 stood alone the omission of a creditor to sue the principal debtor within the period of limitation would discharge the surety under that section as having the legal consequence of discharging the principal debtor, but the Madras High Court relies on the well known distinction between the barring of the remedy by action (which is consistent with the debtor not being discharged for other purposes) and the complete extinction of a debt. It is also thought in England that omission of the creditor to sue within the period of limitation does not discharge a surety for another and more substantial reason than that the surety can himself set the law in operation against the debtor (u). It seems that the opinion of the majority of the High Courts fortified by a judicial dictum of great weight in the English Court of Appeal must be accepted as correct.

In the case of parties to a negotiable instrument their rights and

(c) David Allen v. Mark Ford (1983) 14  
Bam. 200. Nathanial v. Fred Ford  
(1915) 71 Bam. 200. I.C. 100.

(p) *Hypomel* v. *Arenarius* (1881) v.  
B m 61" *Sindus* v. *Europodistys*  
(1883) - B m 146

[illegible]

(r) Subordinate to (c) and (10) 33  
Mad 208 71 (88)

(c) *De l'Etat de l'Union* (100)

[illegible]

(u) *Per Linell v. L.J. Carter & H.A. Co.* (1883), 5 Ch. Div. 672. T. resists to be a director.

liabilities are governed by the Negotiable Instruments Act. Accordingly the omission on the part of an indorsee of a hundi to sue the acceptor within the period of limitation does not discharge the drawer where the suit has been instituted as against him in time (1)

In the case of an agreement being void because of the disability of one of the parties thereto to enter into it, the surety would be held liable as a principal (10)

**135.**—A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor

**Contract to give time to principal debtor.**—The leading English cases have already been cited under the preceding section. The earliest decision, one commonly referred to in modern books, dates from 1795 (11). The general principle was thus stated: "It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in any transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

A nominal giving of time may have the effect, in substance, of accelerating the creditor's remedy, as where, having commenced an action against the principal debtor, the creditor took a recorded acknowledgment of the debt, and undertook not to enforce it before a certain day, which, however, was earlier than the time at which he could have obtained judgment in the action in the ordinary course. In such a case the surety, being manifestly not prejudiced, is not discharged (12)

A contract whereby the creditor promises to give time to the

(v) *Jambu Ramaswamy v Sundararaja* (1902) 26 Mad 239

(w) See *Kashiba v Shripat* (1894) 19 Bom 697, and the English cases cited there.

(x) *Rees v Berrington*, 2 Ves Jr 540, 3 R. R. 3 (Lord Loughborough)

(y) *Hulme v Coles* (1827) 2 Sim 12, 20 R. R. 52. Similarly the surety is not discharged by the creditor's innocent acceptance from the principal debtor of a payment which is in fact a fraudulent preference. *Petty v Cooke* (1871) L. R. 6 Q. B. 790

principal debtor must be distinguished from an unconditional contract not to sue him. In the former case, the remedy of the creditor is merely suspended until the determination of the fixed period, in the latter case the principal debtor is completely released from his obligation so as to entitle the surety to a discharge under s 134, apart from the specific provisions of this section. In either case, the mere formation of the contract is sufficient to operate as a discharge of the surety irrespective of any forbearance that may be exercised under it. The reason of this rule appears to be that a surety has a right, immediately on the debt becoming due, to insist upon proceedings being at once taken by the creditor against the principal debtor, and any contract that would prevent the creditor from suing him would be inconsistent with that right (s 139) (z). But the contract must be a binding one supported by consideration, forbearance to sue, therefore, exercised in pursuance of an agreement without consideration, would not discharge the surety, as it does not amount to anything more than "mere forbearance" within the meaning of s 137 (a). A consent decree, made without the surety's consent, for payment by instalments of the sum due from the principal debtor is a composition such as to discharge the surety (b). It is not necessary that the contract should be express: a tacit or implied contract inferred from the acts of the parties is equally binding as an express one. Thus the acceptance of interest in advance by a creditor operates as a general rule as an agreement to give time to the principal debtor and consequently as a discharge to the surety, for the creditor is in that event precluded from suing the principal until the time covered by the payment in advance has expired (c). But the surety will not be discharged if he consents to the contract. Such consent may be a general one, and it has been held by the Judicial

(\*) See *Protap Chunder v Gour Chunder* (1878) 4 Cal 132, 134.

(a) *Damodar Das v Muhammad Husain* (1900) 22 All 351. *Maharaj Bahadur Singh v Basanta Kumar* (1913) 17 C W N 695, 697-698.

(b) *National Coal Co v Ashutish Bose & Co* (1926) 30 C W N 510, 95 I C 109, A I R 1926 Cal 818. *Mahomed Ali Ibrahimji v Lakshmi Bai Anant Palande* 124 I C 227, A I R 1930 Bom 122.

(c) *See Vair v Isaac MacLellan* (1920)

43 Mad 272, 277, 279, 53 I C 367, is not really to the contrary.

(c) *Kali Prasanna v Ambika Charan* (1872) 9 B L R 261. *Protap Chunder v Gour Chunder*, *supra*. *Gourchandra v Protapchandra* (1880) 6 Cal 241, where it was found that the surety consented to advance interest being taken. See also *Junchanun Ghose v Dalj* (1875) 15 B L R 331, and the observations of 11 ear J at p 334.



139.—If the creditor does any act which is inconsistent

with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired the surety is discharged (n)

*Illustrations*

(a) B contracts to build a ship for C for a given sum to be paid in instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C without the knowledge of A prepares to buy the last two instalments. A is discharged by this preparation. [*Calvert v. London Dock Co* (1837) 2 Keen, 638 44 I P 300 with immaterial variation of facts.]

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B and by A as surety for B together with a bill of sale of B's furniture which gives power to C to sell the furniture and apply the proceeds in discharge of the note. Subsequently C sells the furniture but owing to his misconduct and wilful negligence only a small price is realised. A is discharged from liability on the note. [Perhaps suggested by *Watson v. M'Call* (1853) 4 D M G 242 where the creditor by neglecting to take the benefit of an additional remedy against the principal debtor.]

(c) A puts M as apprentice to B and gives a guarantee to B for M's fidelity. B promises on his part that he will at least once a month see M make up the cash. B omits to see this done as promised and M embezzles A is not liable to B on his guarantee.

**Act or omission of creditor tending to impair surety's remedy**—The language of this section appears to be derived from a statement of the law in *Story's Equity Jurisprudence* s. 325 adopted by the Court of Exchequer in 1860 (o)

Observe that the injurious quality to be considered is tendency to diminish the surety's remedy or increase his liability. Transactions having an immediate tendency to cause or permit the principal debtor to make default are only one species of those to which the surety may object. In almost every case where the surety has been released either in consequence of time being given to the principal debtor or of a compromise being made with him it has been contended that what was done was beneficial to the surety and the answer has always been that the surety himself was the proper judge of that and that no arrangement different from that contained in his contract is to be forced

(n) Cp s. 133 p. 480 above. A certain number of cases may equally well be cited in illustration of the proposition. (i) *Harris v. Skelton* 5 H & N 33 120 I 1 59 161 I 471

upon him, and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is whether what has been done lessens that security " (p)

But mere passive acquiescence by the creditor in irregularities on the part of the principal debtor such as laxity in the time and manner of rendering accounts by a collector of public moneys whose fidelity is guaranteed, will not of itself discharge the surety (q)

Neither is the surety discharged from liability for the principal debtor's default in a manner within the terms of the guarantee, because that default would not have happened if the creditor had exercised all the powers of superintending the performance of the debtor's duty which he could have exercised consistently with the contract. The employer of a servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work (r). ' A surety cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted where that conduct has been caused by a fraudulent act or omission against which the surety by the contract of suretyship has guaranteed the employer (s)

But if the employer of a servant whose fidelity has been guaranteed continues to employ him after a proved act of dishonesty, the surety is discharged (t)

**Act or omission impairing surety's eventual remedy**—The case in which a party is discharged by an act or omission of the creditor of which the legal consequence is the discharge of the principal debtor has been dealt with in s 134, p 485 above. Under the present section a surety will be discharged by acts or (subject to the caution above given) omissions of the creditor specified therein which though not having the legal consequence of discharging the principal impair the eventual remedy of the surety against him (u)

(p) Lord Langdale, *Caltart v London Dock Co*, 2 Keen at p 644 44 R R at p 304

(q) *Mayor of Durlan v Fowler* (1889) 22 Q B D 394

(r) *Major of Kingston upon Hull v Harding* [1892] 2 Q B 494 C A (Subject of guarantee was due performance of

contract for public works. The work was scamped and the defects fraudulently concealed from the town council's engineer and his deputy.)

(s) Bowen L J [1892] 2 Q B at p 504

(t) *Phillips v Foxall* L P 7 Q B 666 1 475 above

(u) See *Pogose v The Bank of Bengal*

Where the liability of a surety guaranteeing payment by a judgment debtor of the amount of a decree by instalments was expressly made dependent on the execution of the decree by the decree holder on the occurrence of a single default, it was held that the omission to execute the decree on the happening of the default until execution had become time barred discharged the surety under the provisions of this section (v). The decision was based on the ground that the decree holder owed a duty to the surety under the terms of the guarantee, and that the failure to perform that duty until the decree became defunct by lapse of time must necessarily have impaired the "eventual remedy" of the surety against the judgment debtor.

As to negotiable instruments, it is specially provided by Act XXVI of 1881, s. 39, that "where the holder of a negotiable instrument without the consent of the indorser destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity."

**140.**—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor (w).

This section lays down a general principle of which the most important practical application is to be found in s. 141. It seems that the intention of the Act is to keep alive for the surety's benefit any right of the creditor, under a security or otherwise, which would otherwise have been extinguished at law by the payment of the debt or perform-

(1877) 3 Cal. 174 where it was held that a deed of trust for the benefit of creditors did not impair the "eventual remedy" of the surety against the principal debtor. *Ghurnani v. National Bank of India* (1916) 20 C. W. N. 562, 33 I. C. 31.

(v) *Harris v. Chunn Lal* (1886) 8 All. 259. The case resembles, on this point, *Watson v. Ilcock*, noted on illustration (i) p. 491 above.

(w) For example the right to stop in transit, and, in an appropriate case, seller's lien. Where, by the custom of trade, a broker who buys for an undisclosed principal is liable to the seller of the goods for the buyer's default and has himself paid the seller he is entitled to the seller's lien as against the buyer. *Imperial Bank v. London and St. Katherine Docks Co.* (1877) 5 Ch. D. 190.

ance of the duty. Such an intention, at any rate, is more elaborately expressed by the English Mercantile Law Amendment Act, 1856 (19 & 20 Vict c 97, s 5) with which the framers of the present Act were undoubtedly acquainted. English Courts of Equity had seen their way to put the surety in the creditor's place for the purpose of using all existing securities and remedies, but not to revive or save for the surety's benefit securities which, on payment of the debt, ceased to exist by operation of law. The practical importance of this exception or limitation, while it lasted, was bound up with technical rules as to the preference of "specialty" over simple contract debts which have now largely ceased to be operative in England, and were never introduced in British India.

Early in the nineteenth century the rule was expounded in an argument of Sir Samuel Romilly's which, like another and better known one of the same learned counsel (x), has attained the very rare honour of being made authoritative by the approval of the Court. "The whole doctrine of principal and surety, with all its consequences of contribution, etc (y) rests upon the established principles of a Court of Equity, not upon contract, except as it may be so represented upon the implied knowledge of those principles. There is no express contract for contribution the bonds generally if not universally, being joint and several creating several obligations by each. [The general reason of the equitable doctrines is] that a surety is to be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment to stand in the place of the creditor not only through the medium of contract but even by means of securities entered into without the knowledge of the surety having a right to have those securities transferred to him though there was no stipulation for that, and to avail himself of all those securities against the debtor. This right of a surety also stands not upon contract, but upon a principle of natural justice' (z).

On the same foundation stands the right of the surety who has paid the debt, or the portion of it which he guaranteed to stand in the creditor's place in the administration of the debtor's estate. The

(x) In *Huguenin v Daseley*. See notes on s 16 pp 98-99 above. Eldon's judgment 14 Ves 169 9 R R 270. Cp *Arishnasami Pattar v Gopala Arishna Reddiar*, 99 I C 676 A I R 1927 Mad 421.

(y) See ss 146-147, pp 507-509 below.

(z) *Craighorne v Swinburne* (1890) 14 Ves 160 9 R R 264 and see Lord

principle is undoubted, and the only difficulty is to be sure whether the surety has really guaranteed only a certain part of the debt, or is surety for the whole, but with a limit of liability (see on s 128, p 470, above)

“When a surety is only a surety for a part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged” (a) In such a case it may be said that “the right of the surety arises merely by payment of the part, because that part as between him and the principal creditor, is the whole” But a surety who has become such, though with limited liability, in respect of the entire debt, has no rights by way of subrogation or in preference to the creditor until the creditor is fully paid (b)

Moreover, the benefit of this principle is intended to persons who, though not actually sureties, are in an analogous position The indorser of a bill of exchange “is primarily liable as principal on the bill, and is not strictly a surety for the acceptor”, but “he has this in common with a surety for the acceptor, that” after notice of dishonour “he is entitled to the benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor” (c)

A surety (or person in a similar position) who has paid his principal's debt is entitled, in the practice of the English Courts to the same rate of interest as a stranger who has made advances (d)

See as to the right of a payer of a bill of exchange for the honour of any party liable upon it the provisions of the Negotiable Instruments Act XXVI of 1881, s 114

**141.**—A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not, and, if the

Surety's right to benefit of creditor's securities

(a) *Gray v Seckham* (1872) L R 7 Ch 680, 683 per Mellish L J

(b) *I e Sass* [1896] 2 Q B 12, 15, he becomes only a creditor of the principal debtor for what he has paid *Darbari Lal v Mahabub Ali Khan* (1927) 49 All 640, 101 I C 517. A I R 1927 411

538

(c) *Duncan Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, 18 per Lord Blackburn

(d) *I e Bentish I and I v I* (1872) I 1 15 I q 47

creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security (c).

*Illustrations*

(a) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage, B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture. [*Cp. Pearl v. Deacon* (1857) 1 De G. & J. 461, where the creditor, being also the debtor's lessor, destroyed the security on the furniture by distraining for rent (which in English law is a paramount right).]

(b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged. [*Mayhew v. Crickett* (1818) 2 Sw. 185, 19 B. R. 57.]

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards C obtains from B a further security for the same debt. Subsequently C gives up the further security. A is not discharged. [The modern doctrine of English equity is *contra*, see below.]

**Surety's right to benefit of securities.**—"As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship (f), if the creditor who has, or ought to have had, them in his full possession or power loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released, if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands" (g).

"The surety in effect bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment" (h), or if a settlement of accounts is otherwise required, e.g., if the surety brings a redemption suit in respect of a security given by him (i). The creditor, however, is not bound to use

(e) See s. 139, p. 494, above.

(f) See judgment of Hall V.C., in *Forbes v. Jackson* (1882) 19 Ch. D. 615, 619.

(g) Notes to *Rees v. Berrington* (1795) in 2 Wh. & T. L. C. as approved by

*Hannen J. Wulff v. Jay* (1872) L. R. 7 Q. B. 756-764, as to the last point, *Pledge v. Buss* (1860) Johns. 663.

(h) See judgment of Hall V.C., in *Forbes v. Jackson*, note (f) above.

(i) *Dixon v. Steel* [1901] 2 Ch. 602.

extraordinary, or, it would seem, any, diligence about preserving or retaining a security which is in fact worthless (j)

It will be seen that the present section, by limiting the surety's right to securities held by the creditor at the date of his becoming surety, has adopted a view which was still not wholly abandoned in England when the Act was framed (k), but which has for a good many years been treated as untenable. One cannot help suspecting that this is not deliberate policy, but merely codification of equity somewhat out of date.

The rule is not confined to securities in any technical sense. A surety is entitled to the benefit of the principal debtor's set-off against the creditor, if it arises out of the same transaction, this follows from the surety's right to be indemnified by his principal, combined with the equitable maxim of avoiding circuity of action (l).

The High Court of Bombay has cited the reason of the present rule as laid down by Turner V -C (m). "I take it to be, because, as between the principal and surety, the principal is under an obligation to indemnify the surety [see s. 145, p. 505, below], and it is, as I conceive, from this obligation that the right of the surety to the benefit of securities held by the creditor is derived."

"To the extent of the value of the security."—Where a creditor sued the principal debtor and the surety on a mortgage bond, and in his plaint formally relinquished his claim against part of the mortgaged property which was worth the amount guaranteed by the surety, it was held that the surety was discharged (n).

(surety, who had not been called on for payment, entitled to be credited in account with proceeds of security given by principal debtor). "It certainly is not the law that a surety has no rights until he pays the debt due from his principal" [1901] 2 Ch. p. 607.

(j) *Painton v Juggins* (1880) 5 Q. B. Div. 422 (a policy on the debtor's life which had lapsed by non-payment of premiums).

(k) Blackburn J. seems to have thought the point doubtful in 1870. See *Polak v Perrett*, 1 Q. B. D. at p. 670. We do not believe he would have found many

equity lawyers to share his doubt. See *Pearl v Deacon* (1857) 1 Do. G. & J. 461, 116 R. R. 89.

(l) *Becheriaise v Lewis* (1872) L. R. 7 C. P. 372.

(m) *Longe v Peynell* (1872) 9 Hare, at pp. 818, 819. *Goverdhandas v Bank of Bengal* (1890) 15 Bom. 48, 63. The facts of the case in Hare were complicated by fraud, and are not thought useful for any purpose of illustration. Cf. Sir S. Romilly's argument in *Craythorne v Swinburne*, p. 497, above.

(n) *Narayan v Ganesh* (1870) 7 B. H. C. A. C. 118.

When surety becomes entitled to benefit of creditor's securities — Under s 140, a surety is invested with the *rights* of the creditor as against the principal debtor *upon payment or performance of all that he is liable for*. The words last italicised are not repeated in the present section. The Act does not lay down at what point of time the surety is entitled to have the creditor's *securities* made over to him wholly or in part, whether it is when the debt of the creditor is paid off or when the surety pays the amount of his guarantee. The point arose in *Goraidhandas v Bank of Bengal (o)*, where it was held that a surety was not entitled to the benefit of a portion of the creditor's securities until the whole of the debt due to the creditor was paid off. In that case a surety who had guaranteed *an aliquot* and defined portion of a past due debt secured by a mortgage claimed to be entitled *on payment by him of the portion of the debt* which he had guaranteed to share in the mortgage in proportion to the amount of the debt which he had guaranteed and paid before the mortgagee had been paid the full amount of his mortgage debt. Farran J, in rejecting the surety's claim said "It seems to me to be a strange doctrine that a creditor not fully secured by a mortgage who obtains the benefit of a surety for part of his mortgage debt in order to further secure himself by that very act is deprived of portion of the security the inadequacy of which was a reason for demanding the surety, or that a person advancing say Rs 10,000 on a mortgage which is valued only at Rs 5,000 and has Rs 5,000 of his advance guaranteed by a surety, is only in reality secured to the extent of Rs 7,500 by reason of the surety's right to claim the benefit of half the mortgage security on paying his half of the debt. To hold so would I think defeat the intention of the parties to such a transaction. A principle of equity is seldom adopted which has that effect. If such were the result of s 111 of the Contract Act I should expect to find the wording of s 140 repeated in s 141. The striking difference in the language of the two sections is a strong argument against the plaintiff's contention" (p)

142.—Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee obtained by misrepresentation in valid

3. The English authorities on the subject-matter of this and s. 143 will be dealt with together under that section.

**143.**—Any guarantee which the creditor has obtained by means of keeping silence as to material circumstance is invalid.

*Illustrations.*

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A, in consequence, calls upon him to furnish security for his duty accounting. C gives his guarantee for B's duty accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid. [*Railton v. Mathews* (1844) 10 Cl & F 934, 59 R. R. 308 (g)]

(b) A guarantees to C payment for iron to be supplied by him to B, to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety. [*Pitcock v. Bishop* (1825) 3 B. & C. 605; 27 R. R. 430]

**Guarantee obtained by misrepresentation or concealment.**—English law is settled that, although the contract of suretyship is "one in which there is no universal obligation to make disclosure"—that is, it is not, like a contract of insurance, liable to be avoided by the mere non-disclosure of any material fact whatever—still the surety is entitled to know so much as will tell him what is the transaction for which he is making himself answerable, and he will be discharged if there is either active misrepresentation of the matter by the creditor, or silence amounting in the circumstances to misrepresentation. "Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid" (r)

"It is the duty of a party taking a guarantee to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglects to do so, it is at his peril. . . . A surety ought to be acquainted with the whole contract entered into with his principal" (s)

(g) *Railton v. Mathews* followed, and the distinction between such intrinsic circumstances as were here not disclosed, and extrinsic ones such as a state of account, as in *Hamilton v. Watson*, note (u), p. 503, below, explained. *L. G. O. Co. v. H'arey* [1912] 2 K. B.

72, C. A.

(r) *Fry J., Davies v. London and Provincial Marine Insurance Co* (1878) 8 Ch. D. 469, 475.

(s) *Bayley J. and Littledale J., Pitcock v. Bishop*, 27 R. R. at pp. 433, 435

Thus where a surety guarantees an agent's existing and future liabilities in account with his employer, and the agent is in fact already indebted to the employer for more than the full amount of the guarantee and the statements made about his position are calculated to mislead, though not false in terms, this is evidence of material misrepresentation on the creditor's part (t)

But it is not every disclosure that a surety can require. Where a customer's credit with his bankers is guaranteed, the fact that the new credit is to be applied to paying off an existing debt of the customer to the bank is not such as need be disclosed. For this is nothing out of the ordinary course of business but rather to be expected. The test is "whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect" (u). The creditor's description of the transaction to be undertaken, if it makes no mention of any such circumstance, implies a representation that there is none (v).

Accordingly the creditor is not bound to tell the surety that the intended guarantee is to be in substitution for a former one given by some one else (w). Where the solvency of a surety for a debt is guaranteed in turn, the terms of the loan as between the creditor and the original debtor are not material for the last mentioned guarantor's risk, and non-disclosure of them is no defence to an action on his guarantee (x).

To avoid a guarantee under this section it must be proved not only that there was silence as to a material circumstance, but that the guarantee was obtained by means of such silence (y). The meaning of the words "keeping silence" in this section was considered by Sargent

(t) *Lee v Jones* (1863) 17 C B N S 482 Ex Ch. A minority of the Court dissented strongly on the facts holding that it was the debtor's business to inform the sureties of his financial condition and theirs to inquire of him rather than of his employers. Generally a surety is not the less bound though he may have acted on some misrepresentation made by the debtor. *Debendra Nath Dutt v Adm Gen of Bengal* (1906) 33 Cal 713 756

(u) *Hamilton v Watson* (1845) 12 Cl & F 109 119 69 R R 58 60 (Lord Campbell)

(v) *Lee v Jones* note (t), above, judgment of Blackburn J

(w) *North British Insurance Co v Lloyd* (1854) 10 Ex 523 102 R R 686

(x) *Seaton v Burnand* [1900] A C 135

(y) *Per Cur in Secretary of State for India v Vilamulam* (1883) 6 Mad 406 408

CJ in a Bombay case (c) The expression "keeping silence," said the learned Judge, "clearly implies intentional concealment as distinguished from mere non disclosure, which no doubt is of itself a fatal objection in insurance policies, and virtually, we think, expresses what is laid down in *North British Insurance Co v Lloyd* (a), that the withholding must be fraudulent, which necessarily must be the case when a material circumstance is intentionally concealed"

"Material circumstance."—As to what amounts to this, further illustrations are afforded by the following cases —

1 A becomes surety to a bank for B's conduct as *khajanchi*, whose duties are to examine, verify, and guarantee all native signatures or documents for money Before his appointment as *khajanchi* B held the office of an ordinary clerk in the bank, and it was arranged between B and the bank that he should continue to fill that office also The bank do not acquaint A with this part of the agreement A is liable as a surety (b)

2 In the above case, after B assumes the office of *khajanchi*, the bank discovers that the names on certain bills discounted with them are forged, and they make a claim upon B, but B repudiates his liability The bank do not acquaint A with this fact, and B is allowed to continue in his office, and subsequently makes defalcations A is liable as a surety, for it could not have been assumed that B was infallible in detecting forgeries, and the guarantee could not be said to be founded on that assumption (c)

3 A purchases an *abkari* farm from Government subject to his furnishing the required security for the due fulfilment of the conditions of the lease A fails to furnish the security, and the farm is resold at his risk and on his account at a loss of Rs 4 000, for which he becomes liable A purchases the farm at the resale and B stands surety for the performance of the conditions of the lease B is not informed by Government of A's liability for Rs 4 000 B is liable as a surety, the guarantee not extending to the liability for Rs 4 000 (d)

The language of these two sections, 112 and 113, is not very well fitted to exclude doubts whether they go beyond the English authorities or not Sec 143 might be read so as to impose on the creditor an unqualified duty of giving the surety full information of all material facts But the words "obtained by means of keeping silence," coupled with the fact that the illustrations are both taken, with no substantial

(c) *Balkrishna v Bank of Bengal* (1891) 15 Bom 585, 591 See also *Delhi and London Bank v Hunter* (1871) 3 N W P 64

(a) 10 L R 523, 532, 102 R P 680 634

(b) *Balkrishna v Bank of Bengal* (1891) 15 Bom 585

(c) *Id*

(d) *Secretary of State for India v Nalankari* (1887) 6 Mad 406 410 The surety bond in this case was executed before the Contract Act came into force, and the Court stated that whether s 113 did or did not embody the rule of English law, the case was to be decided according to the principles of English law, and the result did not differ in the case accordingly

change, from English decisions, appear to limit the operation of the section to cases of wilful concealment which in fact amounts to a misrepresentation of what the surety is undertaking

144.—Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Guarantee on contract that creditor shall not act on it until co surety joins

A surety who “ entered into the obligation upon the understanding and faith that another person would also enter into it . . . has a right in equity to be relieved on the ground that the instrument has not been executed by the intended co surety ” (e) Whether such a contract is to be inferred from the transaction as a whole is concerned (apart from the construction of any written document) to be purely a question of fact The rule will not be extended to cases of joint and several obligation where the transaction is not really a guarantee, though that word may be used, but a primary undertaking (f)

145.—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully

Implied promise to indemnify surety

#### Illustrations

(a) B is indebted to C and A is surety for the debt C demands payment from A, and on his refusal sues him for the amount A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs He can recover from B the amount paid by him for costs, as well as the principal debt

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A, to secure the amount C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action

(c) A guarantees to C, to the extent of 2,000 rupees, payment for rice

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(e) *Evans v Bremridge* (1856) 8 D 480, 481, above  
M G 100, 109, 110 R R 156, per (f) *Ex parte Harding* (1879) 12 Ch D 1  
Turner L J *Cp Bonser v Cox*, pp 557

5.

to be supplied by C to B C supplies to B rice to a less amount than 2 000 rupees but obtains from A payment of the sum of 2 000 rupees in respect of the rice supplied A cannot recover from B more than the price of the rice actually supplied

**Surety's right to indemnity.**—The proposition “that, as soon as his obligation to pay is become absolute, [a surety] has a right in equity to be exonerated by his principal” (g) is treated throughout the English authorities as fundamental, and as furnishing the reason for several of the more specific rules (see p 500, above) It depends in turn on the more extensive principle laid down in s 69 (pp 382, 383, above) In the second clause of the section the words “rightfully” and “wrongfully” do not seem felicitous There is nothing wrongful in paying money which one need not have paid, and for which therefore one cannot have a remedy over against the principal debtor One would rather have expected “reasonably” and “unreasonably” Here, again, a wider rule is applied to the special case of the contract of suretyship (h) Further it has long been settled in England that “a surety is entitled to come” to the Court “to compel the principal debtor to pay what is due from him” provided that an ascertained debt is actually due, and this relief is not limited, as at one time supposed, to cases where the creditor has refused to sue the principal debtor (i)

It is not to be inferred from the language of this section that the surety might not, in an appropriate case, be entitled to recover for special damages beyond the sum he has actually been compelled to pay His right is not merely a right to stand in the creditor's place, but is founded on an independent equity (j)

On the other hand, the surety's only claim is to be fully indemnified He cannot compound the debt for which he is liable, and then proceed as if he stood in the creditor's place for the full amount

Where a surety gets rid of and discharges an obligation at a less sum than its full amount he cannot, as against his principal, make himself a creditor for the whole amount, but can only claim, as against his

(g) *Becherroux v Lewis* (1872) 1 R 7 C 1 372 373

(h) See *Agius v C B Colbery Co* [1811] 1 Q B 413 C 1 *Hammond v Co v Lacey* (1857) 20 Q B Div 71 cited on s 73 illustration (j) p 417 above

(i) *Ischerson v Trelogie Dry Dock etc Co* [1909] 2 C 1 401 404

(j) See per Stirling J *Indefatigable v Consolidated Bank* (1881) 71 Ch Div at p 56 The reversal of the decision on the main point 78 Ch Div 230 does not affect this

principal, what he has actually paid in discharge of the common obligation ' (k)

“ Whatever sum he has rightfully paid ”—This expression includes “ not only com, but also property, of whatever kind, which is parted with in lieu of money, but not the mere incurring of a pecuniary obligation of the creditor in lieu or discharge of the debt owing to him ’ (l) The giving, therefore, by the surety of a promissory note jointly with a third party as his surety, though accepted by the creditor as payment of the debt and not as a mere collateral security therefor, cannot be treated as payment as between the surety and the principal debtor (m) The reason is that, the principal debtor being bound to indemnify the surety, the cause of action cannot be merely the procuring by the surety of the principal debtor's exoneration from liability to the creditor, but must also include the surety being himself damaged (n) and the surety cannot be said to be damaged unless the payment is actually made

**Guarantee without concurrence of principal debtor**—Where a person becomes a surety without the knowledge and consent of the principal debtor the only rights which he acquires are those given by ss 140 and 141, and not those given by this section (o)

There are conflicting opinions on the question whether a surety paying a debt which is barred by limitation can be said to have paid “ rightfully ” within the meaning of this section (p)

**146.**—Where two or more persons are co sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co sureties, in the absence of

Co sureties  
liable to con-  
tribute equally

(k) *Reed v Norris* (1837) 2 My & Cr 361 375 45 R R 88 94 (Lord Cottenham) On the point that there is no subrogation *cp Periamanna Marakayar v Banians & Co* (1925) 49 Mad 156, 95 I C 154 A I R 1926 Mad 544

(l) *Per Bhashyam Ayyangar J in Putti Narayanamurthi v Marimuthu* (1902) 26 Mad 322 328

(m) 26 Mad 322 328

(n) *Ib id* 326

(o) *Muthu Raman v Chinna Vellayan* (1916) 39 Mad 965 33 I C 508

(p) *No Suja v Pahlwan* (1878) Punj Rec no 30 Yes (at any rate if he pays under a decree) *Paghavendra Gururan v Mah pat Krishna* (1914) 49 Bom 202 86 I C 883 A I R 1915 Bom 244

any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor

*Illustrations*

(a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

(b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one quarter, B to the extent of one quarter, and C to the extent of one half. E makes default in payment. As between the sureties A is liable to pay 200 rupees, B 250 rupees, and C 500 rupees.

**Contribution by co-sureties**—This has long been elementary. The earliest case usually cited settled that the co-sureties need not be bound under the same contract and laid down that the right to contribution is independent of any agreement for that purpose (q).

It must be observed that a "surety has no claim against his co-sureties until he has paid more than his share of the debt to the principal creditor" (r), for only then does it become certain that there is ultimately any case for contribution at all. But a judgment against the surety at the suit of the creditor for the full amount of the guarantee (or an equivalent process, such as the allowance of a claim for the sum in the administration of the surety's estate) will have the same effect as payment for this purpose, and entitle the surety or his representatives to a declaration of the right to contribution, it seems that this is a matter of purely equitable jurisdiction (s). The like principles apply to contribution among co-trustees (t).

All the co-sureties are entitled to share in the benefit of any security or indemnity which any one of them has obtained from the principal debtor, and this whether they knew of it or not (u). The surety bring-

(q) *Dering v. Earl of Winchelsea* (1787) 1 Cox, 318. 2 Bos. & P. 270, 1 R. R. 41. and see other judgments cited by Wright J. in *Holmershausen v. Gullick* [1893] 2 Ch. 523 *et seq.*

(r) *Ex parte Snowden* (1881) 17 Ch. Div. 41, 48 per Brett J. following *Du es v. Humphreys* (1810) 6 M. & W. 153, 55 R. R. 617, 679. It is not enough that he has paid more than his share of

a part of the debt which has become due. *Shirley v. Burdett* [1811] 2 Ch. 118. It must be determined by the circumstances of each case whether there is an indivisible principal debt or several debts.

(s) *Holmershausen v. Gullick* [1893] 2 Ch. 514.

(t) *J. J. J. v. Harkin* [1890] 2 Ch. 415.

(u) *Steel v. Dizon* (1881) 17 Ch. D. 8.

ing in, under this rule, what he receives from his security, may resort again to that security for the liability to which he remains subject, and the co sureties may again claim the benefit of participation and so on until the co sureties have been fully reimbursed or the counter security exhausted (1)

There is no right of contribution between persons who become sureties not for the same debt, but by distinct and separate obligations for different portions of a debt (w) Nor is there any such right between an ultimate surety for payment of a debt and a person who, though a surety as between himself and the principal debtor, has authorised the creditor to treat him as a principal Where B joined with A in a mortgage of A's property to Z, and agreed to be considered, as regards Z, as a principal debtor for the whole, though as between A and himself he was a surety, and the debt was insured with M, who knew the terms of B's engagement, in the name of Z, M undertaking to pay the debt on notice that Z's power of sale had become exercisable, it was held that M was a guarantor to Z against the default of both A and B, and was not a co surety with B (x) An express contract between Z and M that M was to be a surety *for*, but not *with*, B, by way of "collateral security," would have the same effect (y)

Liability of co  
sureties bound in  
different sums

147.—Co sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit

#### Illustrations

(a) A B and C as sureties for D enter into three several bonds each in a different penalty namely A in the penalty of 10 000 rupees B in that of 20 000 rupees C in that of 40 000 rupees conditioned for D's duly accounting to L D makes default to the extent of 30 000 rupees A B and C are each liable to pay 10 000 rupees

(b) A B and C as sureties for D enter into three several bonds each in a different penalty namely A in the penalty of 10 000 rupees B in that of 20 000 rupees C in that of 40 000 rupees conditioned for D's duly accounting to I D makes default to the extent of 40 000 rupees A is liable to pay 10 000 rupees and B and C 15 000 rupees each

(c) A B and C as sureties for D enter into three several bonds each in a different penalty namely A in a penalty of 10 000 rupees B in that of

(v) *Berridge v Berridge* (1890) 44 Ch D 168

(w) *Coope v Twynam* (1823) Turn & Russ 426, 24 R R 89

(x) *Re Denton's Estate* [1904] 2 Ch 178

C A following the distinct one laid down in *Craythorne v Swinburne* (1807) 14 Ves

160 9 R R 264

(y) *Craythorne v Swinburne* (1807), last note

20 000 rupees C in that of 40 000 rupees conditioned for D's duly accounting to E. D makes default to the extent of 70 000 rupees. A, B and C have to pay each the full penalty of his bond.

The wording of this section and its effect as shown by the illustrations are perfectly clear and the question why it says 'equally' and not 'rateably' thus making what seems an arbitrary departure from the rule as previously understood is not one which we have any means of answering. There is no variation between this section and the original draft.

## CHAPTER IX

## OF BAILMENT

148 —A ‘bailment’ is the delivery of goods by one

Bailment  
bailor and  
bailee defined

person to another for some purpose, upon a contract that they shall when the purpose is accomplished, be returned or otherwise dis-

posed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

*Explanation*—If a person already in possession of the goods of another contracts to hold them as a bailee he thereby becomes the bailee and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

The late Mr Justice Story's (2) works on bailment and agency acquired a classical reputation and were largely used in this and the following chapter by the framers of the present Act on the whole with very good results. But as those works have not been re edited for many years and have in England at any rate ceased to be in common use though fairly recent judicial citations occur it is not thought worth while to furnish the text of the Act which after all is its own sufficient authority with specific references to them.

( ) Of the Supreme Court of the United States from 1811 to 1815. Story was not a title, and always with the right to deal with a title, and it was a

**Nature of the transaction** —“ Bailment ” is a technical term of the Common Law, though etymologically it might mean any kind of handing over (Fr *bailleur*) It involves change of possession One who has custody without possession like a servant, or a guest using his host's goods, is not a bailee But constructive delivery will create the relation of bailor and bailee as well as actual, as stated in the Explanation

The bailee's duty to deal with the goods according to the bailor's orders is incidental to the contract of bailment, and arises on the delivery of the goods, although those orders may have already been given and accepted in such a manner as to constitute a prior special contract (a) As a matter of pleading this is no longer material in England or India, but it might still be material with regard to the period of limitation

Bailment is necessarily dealt with by the Contract Act only so far as it is a kind of contract It is not to be assumed that without an enforceable contract there cannot in any case be a bailment In England the conviction of an infant for the statutory offence of larceny by a bailee has been upheld (b) “ It is conceived ” says Sir R S Wright (c), ‘ that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep or return or deliver to him the specific thing or to convey and apply the specific thing according to the directions antecedent or future of the other person ’

The words “ otherwise disposed of ” in the present section express the common law as now understood It seems clear that a bailee is not the less a bailee because he is clothed with authority to sell the thing which is bailed to him e g, a factor for sale (d) On the whole a bailment may be described as a delivery on condition to which the law usually attaches an obligation to redeliver the goods or otherwise deal with them as directed when the condition is satisfied, but there may be, in particular cases a bailment without an enforceable obligation (e)

(a) *Streeter v Horlock* (1829) 1 Bing 34 20 R R 579

(b) *R v McDonald* (1885) 10 Q B D 373 (No such question could arise under the Indian Penal Code)

(c) Pollock and Wright on Possession 163

(d) Sir R S Wright *op cit* 161 162

(e) Judgment of Cave J *R v McDonald* (1885) 10 Q B D at p 379

Where a chattel is delivered by mistake, the intention being to deliver another chattel either with or without conditions, the legal result, whatever it may be, is not a bailment, for there is no intention at all to deliver the chattel which is in fact delivered, and no contract with respect to it. The late Lord Coleridge's opinion "that bailment is not a mere delivery on a contract, but is a contract itself" (f) may not be a very clear or convincing reason for this proposition, but does not affect its truth. The problems which arise in this connection are, however, outside the scope of this Act.

The judgment of Holt C J in *Coggs v Bernard* (g) is celebrated as the first judicial exposition of this branch of law, as indeed it is one of the earliest attempts, outside the law of real property, to give a connected and rational exposition of any branch of the Common Law as a whole. But the somewhat minute distinctions there laid down were really taken from the Roman law through Bracton, and, whether they were ever operative in the law of England or not, they are not adopted in this Act (see s 151, p 516, below).

One result of Holt's reliance on Bracton is that in later times English Courts have felt themselves rather specially free to refer to the Roman law in questions on the contract of bailment (h), but this is now in India, and probably in England, rather a matter of literary curiosity than anything else.

**No bailment where whole property transferred**—Obviously no transaction can be a bailment within the Act which does not satisfy the terms of this section. Accordingly there is not a bailment if the thing delivered is not to be specifically returned or accounted for and so is the Common Law.

A delivery of property on a contract for an equivalent in money or in other commodities (whether like the property delivered or not) is a sale or exchange and not a bailment, as where farmers deliver grain to a miller to be used by him in his trade, and are entitled to claim an equal quantity of corn of like quality or its market price (i).

**An agent authorised to receive payment, and bound to hand over**

(f) *P v Ashwell* (1885) 16 Q B D at p 223

(g) (1703) 2 Ld Raym 909, 1 Sm L C 173

(h) See the judgment of the Court in

*Blakemore v Iradol and Exeter Ry Co* (1858) 8 J & B 1015, 1020, 112 R R 840 887

(i) *South Austral in Insurance Co v Landell* (1860) L R 3 P C 101

to his principal an equivalent sum, but not necessarily the actual coin or instruments of credit received by him, is not a bailee (j)

Similarly the delivery of Government promissory notes to a treasury for cancellation and consolidation into a single note is not a bailment, for there is no contract in such a case that the notes shall be returned or otherwise disposed of according to the directions of the owner (k)

Again the relation between a native banker and the person depositing money with him in the ordinary way of business is that of borrower and lender, and the money so lodged can be recovered only as "money lent" under art 59 of the Limitation Act, and not as "money deposited" under an agreement that it shall be "payable on demand" under art 60. In the former case the period of limitation runs from the date of the loan, and in the latter from the date of demand (l). "The mere use of the term 'deposit' cannot alter the substance of the transaction" (m). It is in each case a question of fact whether a transaction amounts to a mere loan or a deposit under art 60 (n).

#### 149.—The delivery to the bailee may be made by doing

Delivery to anything which has the effect of putting the  
bailee how made goods in the possession of the intended bailee  
or of any person authorised to hold them on his behalf.

Compare ss 33, 34 of the Indian Sale of Goods Act, 1930

The bailor's part need not be very active. Mere assent, for example, of a guest at a place of public entertainment to a servant's officious assumption of custody may be sufficient evidence of delivery to make the proprietor of the house a bailee and responsible for loss (o). Having regard to the course of dealing of a railway company, the mere

(j) See *Bridges v Garrett* (1870) 1 L R 5 C P 451, in Fx Ch, judgment of Blackburn J

(k) *Secretary of State for India in Council v Sheo Singh* (1880) 2 All. 756, 760

(l) *Ichha Dhanji v Natha* (1888) 13 Bom 338

(m) *Per Cur in Pam Sulk v Brohmaja Das* (1871) 6 C L R 470

(n) *Ishur Chunder v Jibun Kumars* (1888) 16 Cal 2. *Icanderatayar v*

*Lammaltor* (1855) 18 Mad 330, *Dorabji v Muncherji* (1891) 19 Bom 352 in app *ibid* p 775. Cf *Re Tidd* [1893] 3 Ch 151 where there seems to be some want of adequate distinction between a deposit of specific goods or coins and a deposit in the banking sense, i.e., a loan not immediately repayable, though the decision is clearly correct

(o) *Lit en v Nicols* [1894] 1 Q B 92 which really decides very little

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*Blakemore v Bristol and Exeter Ry Co* (1858) 8 L & B 1035, 1050, 112 R R 880 887

(i) *South Australian Insurance Co v Randall* (1869) 1 R 3 P C 101

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149.—The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf

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(o) *Ult en v Nicols* [1894] 1 Q. B. 97 which really decides very little

was not affected by the Contract Act (j) The same point arose before the Judicial Committee of the Privy Council in an appeal from the Court of the Recorder of Rangoon, where it was held, approving the Calcutta decision, that the duties and liabilities of a common carrier in India are governed by the principles of the English Common Law in conjunction with the provisions of the Carriers Act, and that, notwithstanding some general expressions in the chapter on Bailments, the responsibility of a common carrier is not within the Contract Act (k) The decision proceeded on the grounds (1) that, if the liability of a common carrier was governed by ss 151 and 152 of the Contract Act, the provisions of ss 6 and 8 of the Carriers Act would be rendered *nugatory*, though s 1 of the Contract Act declares that nothing in that Act contained shall affect the provisions of any Act not thereby "expressly repealed," and the Carriers Act is not one of the Acts so repealed, (2) that at the date of the Contract Act the law in force in British India relating to common carriers was partly written, being the Carriers Act, and partly unwritten, being the English Common Law, which together formed a code at once simple, intelligible, and complete, and that, had it been intended to codify the law of common carriers by the Contract Act, the more usual course would have been to repeal the Carriers Act and to re enact its provisions, instead of sweeping away the common law by a side wind and leaving the law on the subject to be gathered from two Acts; and (3) that the mere fact that the Contract Act treats of bailments in a separate chapter, and that the definition of bailment is wide enough to include bailment for carriage, does not show any intention to abrogate the common law rule, for the Act, as appears from the preamble thereto, does not purport to do more than to define and amend certain parts of the law relating to contracts The result is that the rights and liabilities of common carriers are outside the Indian Contract Act, and they are governed by the principles of English law as modified by the Carriers Act of 1865 (l)

**Carriers by sea for hire** are not common carriers within the meaning of the Carriers Act III of 1865 (m) There is a conflict of decisions as to

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| (j) <i>Mookhara Kant v I O S v Co</i><br>(1883) 10 Cal 166                            | <i>ance Co, Ltd v India General Navigation<br/>and Packing Co, Ltd</i> (1910) 38 Cal 28,<br>91 C 364 As to railways, see the next<br>paragraph but one |
| (k) <i>Irrawaddy Flotilla Co v Bug<br/>mandas</i> (1891) 18 Cal 620 I R 18 I<br>v 121 | (m) <i>Kumber v The R I S A Co, Ltd</i><br>(1913) 38 Cal 941, 20 I C 519   |
| (l) <i>British and Foreign Marine Ins r</i>   |  |

the liability of such carriers being governed by the Common Law of England or the provisions of ss 151 and 152 of this Act. The High Court of Calcutta has held that a foreign company (which in that case was a French company) are not common carriers in the ordinary English sense of the word, and that if the contract of affreightment is made in British India (as in that case in Calcutta), their liability is governed by the provisions of ss 150 and 151 (n). On the other hand, the High Court of Madras held in a case in which the same company were defendants and the contract of affreightment was also made in Calcutta, that the company were none the less common carriers because they were a foreign company, and that the liability of the company was governed by the common law of England, and not by the provisions of this section. "The contract," said the Court, "was made at Calcutta, and whatever the nationality of the defendants or their ship, the law applicable to them is the *lex loci contractus*. The *lex loci* is the law of England, the defendants are therefore in our opinion common carriers, and the English law as to common carriers applies to them" (o).

**Carriers by Railway**—The liability of carriers by railway is now governed by the Railways Act IX of 1890. Sec 72 of that Act provides that the responsibility of a railway administration (p) for injury to goods delivered to it to be carried by railway is, subject to the other provisions of the Act, that of a bailee under ss 151, 152, and 161 of the

*Boggiano & Co v The Arab Steamers Co, Ltd* (1916) 40 Bom 529 535-536 33 I C 536. See Carriers Act III of 1865 s 2 which defines a common carrier. But carriers by inland navigation or by river steamers are common carriers, see *India General Steam Navigation Co v Bhagwan Chandra Pal* (1913) 40 Cal 716 718, *Dekhari Tea Co v Assam Bengal Railway Co* (1920) 47 Cal 6 57 I C 406. *Inda General Navigation and Railway Company v Eastern Assam Railway Co* (1920) 47 Cal 1027, 61 I C 14.

(n) *Macmillan v Compagnie des Messageries Maritimes de France* (1880) 6 Cal 227.

(o) *Haji Ismail Sat v The Company of the Messageries Maritimes of France* (1905) 28 Mad 400. The suit was again t

the company for damage caused to the goods by landing them in rain and it was held that though the act amounted to negligence on the company's part, they were exempted from liability by a clause in the bill of lading which provided that the company should not be liable for the negligence of its servants. *Kumber v The B I S & Co Ltd* (1913) 38 Mad 941 20 I C 546, *Mylappa Chettiar v The B I S & Co Ltd* (1917) 34 Mad L J 553 557, 45 I C 485.

(p) Railway administration in the case of a railway administered by the Government or a native State means the manager of the railway and includes the Government or the native State, and, in the case of a railway administered by a railway company means the railway company s 3 cl 6 of Railways Act

Contract Act (g), and that it shall not be affected by the Common Law of England or the Carriers Act, but that it may be limited by a special agreement between the parties, provided that it is in writing by or on behalf of the person sending the goods and is otherwise in a form approved by the Governor General in Council. Several railway companies in India have accordingly issued what is called "the risk note" in a form approved by the Governor General in Council, which is used when the sender elects to despatch at a "special reduced" or "owner's risk" rate articles for which an alternative "ordinary" or "railway risk" rate is quoted in the tariff. The "risk note" provides that, in consideration of the railway company carrying the goods at a special reduced rate, they shall be exempted by the sender from liability for loss or damage to the goods from any cause whatever before, during, or after transit over the railway or other railways working in connection therewith. Such a note signed by the sender constitutes a special contract within the meaning of s 72, and a railway company cannot, therefore, be rendered liable on such a note, whatever may be the cause of injury to the goods (r).

**Innkeeper.**—It has been held by the High Court of Allahabad that the liability of a *guest* in respect of *goods belonging to a hotel keeper* and used by the guest is that of a bailee under ss 151 and 152 of this Act, so that the guest is not responsible for the loss, destruction, or deterioration of the furniture in his use if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of similar furniture of his own (s). On the other hand, it was held by the

(g) In *Secy of State v Bhagwan Das* (1927) 49 All 889 102 I C 440, A I R 1927 All 371, the Contract Act appears to have been inadvertently treated as directly applicable, but this did not affect the result. We may mention here that cases turning merely on the construction of risk notes and matters of evidence as applicable thereto are purposely not cited as not being relevant to the general law of contract.

(r) *Tippanna v Southern Maratha I J Co* (1892) 17 Bom 417. *Palaram v Southern Maratha R J Co* (1894) 19 Bom 159. *East India P J Co v Tungal Ali* (1895) 18 All 42. *Toonji Lam v East India I J Co* (1902) 30 Cal 2. See also

*Jalim Singh v Secretary of State* (1904) 31 Cal 951, *Ladhu v S P & D Railway* (1886) Punj Rec no 97, *Arunachellam v Madras Railway Co* (1909) 33 Mad 120, *Narain v F I Railway Co* (1912) 34 All 656, 16 I C 369. *East India P J Co v Aillanta Roj* (1914) 11 Cal 576, 22 I C 679, *East India Railway Co v Shu Prosad* (1912) 17 C W N 529, 18 I C 216. *Ichalkhand & Kaurun R J v Ismail Khan* (1915) 13 All I J 417, 29 I C 207. *East Indian Railway Co v Kanak Behari* (1917-1918) 22 C W N 622, 44 I C 691.

(s) *Rimpal Singh v Murray & Co* (1893) 22 All 164.

Bombay High Court in a case which arose six years before the date of the Contract Act, that the liability of a *hotel keeper* in respect of goods belonging to a guest was governed by the Common Law of England (t) According to that law, an innkeeper is liable for loss or damage of goods belonging to the guest unless the loss or damage arises from the guest's negligence, the act of God or the King's enemies (u) In the Bombay case however the hotel was in Bombay the hotel keeper was a Parsi, and the guest was a European and the decision was entirely confined to these facts the Court declining to consider what the liability would have been if either of the parties was a Hindu or a Mahomedan Again it is not clear what the decision would have been if the case arose in the Mufassal where the English Common Law had not been introduced To us it appears that the liability of an innkeeper should be governed by the provisions of ss 151 and 152 The case of an innkeeper is different from that of a common carrier there is nothing to show that the Common Law rule as to the liability of an innkeeper has been recognised throughout India as is the case with common carriers and there is no Indian enactment relating to innkeepers similar to the Carriers Act, with which the provisions of ss 151 and 152 if applied to innkeepers, could conflict (v) This opinion is now supported by a decision of the Allahabad High Court (w)

**Burden of proof**—In cases governed by the provisions of ss 151 and 152, the loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence, and the burden of proof therefore to disprove negligence lies on the bailee The same rule applies by reason of s 72 of the Railways Act to a railway administration (x) unless the goods are consigned under a risk note under which the railway company are *absolved from all liability for loss or damage except that due to wilful negligence on the part of their servants* in which case the burden lies in the first instance upon the company to prove that the loss was such

(t) *Hotele J v Palanji* (1866) 3 B H C O C 137 146

(u) *Calje's Case* 1 Smith's L C 11th ed 119 *Morgan v Percy* (1861) 6 H & N 265

(v) In England the common law liability of an innkeeper has been limited by the Innkeeper's Liability Act 1863

(w) *Jan and Son v Cameron* (1927) 44

All 735 68 I C 679

(x) *Nanku Ram v Indan Midland P J Co* (1900) 27 All 361 *Surendra Lal v Secretary of State for India* (1917) 25 Cal L J 37 40 38 I C 707 *Hirji Khetsaj & Co v B P & C I P y Co* (1915) 39 Bom 191 25 I C 241 *Gauri Mal Nara n Das v Secy of State* 91 I C 763 A I P 19-6 Lab 217

as was contemplated by the contract, and when this has been done it shifts upon the plaintiff to show that the loss was due to the wilful neglect of the company or its servants (y) A railway company receiving goods for carriage is not bound to inquire into the apparent owner's title or to see that the risk-note is read and understood by the person who delivers the goods (z) As regards goods delivered to a common carrier, he is liable even if there be no negligence on his part except in certain cases mentioned above (see note "common carriers," p 517, above) Under s 6, however, of the Carriers Act he may by special contract limit his liability, but even then the burden lies on him, by reason of s 9 of the Act, to disprove negligence (a)

There is a special class of cases where goods are destroyed by fire arising from some unknown cause, while they are in the possession of a common carrier or a railway company In *River Steam Navigation Company v Choutmull* (b), which was a suit against common carriers for loss of goods occasioned by fire which originated from some unknown cause, the Judicial Committee said "It appears that the defendants have not at all exonerated themselves from the onus cast upon them of showing that the fire originated from causes over which they had no control and could not have been expected to have had any control" This does not mean that a railway company must be held liable for every accident of which it cannot assign the precise cause, it is enough to satisfy the Court that due care has been used both generally and in respect of the plaintiff's goods (c)

(y) *Great Indian Peninsular Railway v Jitan Pam* (1923) 2 Pat 442 72 I C 440, dissenting from *Great Indian Peninsular Railway v Ramchandra Jagannath* (1921) 45 Bom 1206, 63 I C 234 *Smith, Limited v Great Western Railway Company* [1922] 1 A C 178 which *Sheo Narain v East Indian Railway* (1927) 50 All 246, 108 I C 691, A I R 1928 All 103, attempts to distinguish *Janki Das Gobind Puri v Secy of State* (1925) 22 All L J, 1020, 85 I C 114, A I R 1925 All 1014 on the construction of the risk note *Sheo barut Pam v The Bengal N B Ry Co* (1912) 16 C W N 760

(z) *G I P Ry Co v Chakravarti Sons & Co* (1927) 55 Cal 112 106 I C 217,

In a case where the suit was one

A I R 1928 Cal 170 See further, *G I P Ry Co v Jes Raj Patuani* (1927) 55 Cal 132, 106 I C 252, A I R 1928 Cal 65

(a) *River Steam Navigation Co v Choutmull* (1899) L R 26 I A 1, 26 Cal 398 affmg 24 Cal 786, *India General Steam Navigation Co v Bhagwan Chandra Pal* (1913) 40 Cal 710 See also *India General Steam Navigation Co v Gopal Chandra* (1914) 41 Cal 80 87-88 19 I C 756

(b) (1899) I P 26 I A 1, 26 Cal 398 affmg 24 Cal 786

(c) *Janki Chand v G I P Ry Co* (1913) 37 Bom 1, 16-18, *Kalya Khatsaj & Co v B B & C I Ry Co* (1917) 33 Bom 191 190 210, 25 I C 241 We cannot

for damages for loss of cargo by fire the Judicial Committee, after referring to ss 151 and 152, observed as follows —

The weight to be attached to the judgment of the learned Judge of first instance, who saw the witnesses, is a good deal lessened by reason of his having apparently thrown the burden of proof on the wrong party. He states that it was, in his opinion, incumbent upon the defendant company to satisfy him that they had taken such care of these goods as a man of ordinary prudence would take of his own goods. This in their Lordships' view, is not a correct statement of the law. It is true that under the Law of Evidence Act of 1872, s. 106, 'when any fact is especially within the knowledge of any person, the burden of proving that fact is on him', and it was therefore right that the defendant company should call the material witnesses who were on the spot, as it seems to have done. But this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence, or (expressing it otherwise) the negligence of the servants of the defendant company. It may be for the company to lay the materials before the Court, but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant company have not shown due care, skill and nerve" (d)

As regards bailments for hire, the rule has thus been stated by Strachey C J. "If the damage caused were such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be for the hirer to prove that he had exercised such prudence, otherwise I think the owner must give some evidence of negligence" (e). Thus where a person hires a horse for riding in a sound condition and the horse dies the same day while it is in his custody, it is for the hirer to prove that he had taken such care of the horse as a man of ordinary prudence would, under similar circumstances, have taken of his own (f). Similarly, where goods delivered for safe custody for reward are lost while in the possession of the bailee, the burden lies on the bailee to prove absence of negligence on his part (g). But where hotel furniture used by a guest while suffering from an infectious disease is destroyed by the hotel keeper to prevent infection, it lies on the hotel keeper, if he claims damages for the loss thereof, to prove that the guest did not take as much care of the goods as a person of ordinary prudence would have taken of his own goods under similar circumstances (h).

of course, pursue in this work the distinctions to be made in applying the principle independent of contract commonly referred to by the catch word *res ipsa loquitur*

(d) *Dwarkanath v The Rivers Steam Navigation Co., Ltd* (1918) 27 Cal L J 615, 20 Bom L R 725 46 I C 319 [P C]

(e) *Rampal Singh v Murray & Co* (1899) 22 All 164 167

(f) *Shiels v Wilkinson* (1887) 9 All 398, 406. See Evidence Act s 106

(g) *Trustees of the Harbour Madras v Best & Co* (1899) 22 Mad 524

(h) *Rampal Singh v Murray & Co* (1899) 22 All 164

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(z) *G I P P Co v Chakravarti Sons & Co* (1927) 55 Cal 112, 106 I C 217,

A I R 1928 Cal 170 See further, *G I P R Co v Jes Raj Patwari* (1927) 55 Cal 132, 106 I C 252, A I R 1928 Cal 65

(a) *River Steam Navigation Co v Choutmull* (1899) L R 26 I A 1, 26 Cal 398, affmg 24 Cal 786, *India General Steam Navigation Co v Bhaguran Chandra Pal* (1913) 40 Cal 716 See also *India General Steam Navigation Co v Gopal Chandri* (1914) 41 Cal 80, 87-88 19 I C 756

(b) (1899) I R 26 I A 1, 26 Cal 398, affmg 24 Cal 786

(c) *Talki Chand v G I I Jy Co* (1913) 37 Bom 1, 16-18, *Karji Akhetsey & Co v B L & C I Jy Co* (1915) 39 Bom 191, 200 210, 25 I C 241 We cannot

for damages for loss of cargo by fire the Judicial Committee, after referring to ss 151 and 152, observed as follows —

The weight to be attached to the judgment of the learned Judge of first instance who saw the witnesses is a good deal lessened by reason of his having apparently thrown the burden of proof on the wrong party. He states that it was, in his opinion, incumbent upon the defendant company to satisfy him that they had taken such care of these goods as a man of ordinary prudence would take of his own goods. This in their Lordships' view, is not a correct statement of the law. It is true that under the Law of Evidence Act of 1872, s. 106 'when any fact is especially within the knowledge of any person, the burden of proving that fact is on him', and it was therefore right that the defendant company should call the material witnesses who were on the spot, as it seems to have done. But this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence, or (expressing it otherwise) the negligence of the servants of the defendant company. It may be for the company to lay the materials before the Court, but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant company have not shown due care, skill and nerve' (d)

As regards bailments for hire, the rule has thus been stated by Strachey C J. "If the damage caused were such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be for the hirer to prove that he had exercised such prudence, otherwise I think the owner must give some evidence of negligence' (e). Thus where a person hires a horse for riding in a sound condition and the horse dies the same day while it is in his custody, it is for the hirer to prove that he had taken such care of the horse as a man of ordinary prudence would, under similar circumstances, have taken of his own (f). Similarly, where goods delivered for safe custody for reward are lost while in the possession of the bailee, the burden lies on the bailee to prove absence of negligence on his part (g). But where hotel furniture used by a guest while suffering from an infectious disease is destroyed by the hotel keeper to prevent infection it lies on the hotel keeper, if he claims damages for the loss thereof, to prove that the guest did not take as much care of the goods as a person of ordinary prudence would have taken of his own goods under similar circumstances (h).

of course pursue in this work the distinctions to be made in applying the principle independent of contract commonly referred to by the catch word *res ipsa loquitur*

(d) *Dwarkanath v The Rivers Steam Navigation Co Ltd* (1918) 27 Cal L J 615, 20 Bom L R 725 461 C 319 [P C]

(e) *Rampal Singh v Murray & Co* (1899) 22 All 164 167

(f) *Shields v Wilkinson* (1884) 9 All 398 406. See Evidence Act s 106

(g) *Trustees of the Harbour Madras v Best & Co* (1899) 22 Mad 524

(h) *Rampal Singh v Murray & Co* (1899) 22 All 164

Compare the Transfer of Property Act, s 76, cl (a), as to care required of a mortgagee in possession

**Contract by bailee exempting himself from liability for negligence.**—A bailee's liability cannot be reduced by contract below the limit prescribed by this section, a contract by a bailee purporting to exempt him wholly from liability for negligence is not valid (1) A different opinion, however, appears to prevail in Burma (2)

**Bailee's liability for negligence of servants.**—A bailee's liability extends to damage caused by the negligence of his servants acting in the course of their employment about the use or custody of the thing bailed but it does not extend to damage caused by the acts or defaults of third persons which he could not by ordinary diligence have foreseen and prevented, nor to unauthorised acts of his servants outside the scope of their employment (3)

**152.**—The bailee, in the absence of any special contract is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Note that by English law, "in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed" His right is the general right of a lawful possessor against a wrongdoer, and does not at this day depend on his liability to the bailor, whatever may be the true historical view of the mediæval law (4) The bailee's rights

(1) *Sheik Mahomed v The British India Steam Navigation Co Ltd* (1908) 32 Mad 95 at p 120 In *Bombay Steam Navigation Co v Vasudev Labarao* (1907) 52 Bom 37, 106 I C 470, A I R 1928 Bom 5 the dissenting judgment in this case seems to have been taken for the judgment of the Court so the result is not instructive On the facts it is not easy to say so far as they appear evidence of any negligence at all

(2) *Fat Ching v Maing I Choo*

(1929) 7 Ran 339, 120 I C 833

(3) *Sanlerson v Collins* [1901] 1 K B 628 C A overruling *Couplé Co v Maddick* [1891] 2 Q B 413 so far as it purports to lay down any different rule of law *Cp Ullrich v Aiche* [1891] 1 Q B 92 illustrating the ways in which such questions may arise

(4) *The Bankfield* [1902] 1 K B 42 C A overruling *Clunzie v Smith* *Staffordshire Tramway Co* [1892] 1 Q B 1251 59 Both the arguments and the

against strangers are naturally not specified in the present Act, as they do not differ from the rights of any other lawful possessor and arise not from the contract of bailment, but from the fact of possession

**Care to be taken by bailee** — Since the standard of diligence required of a bailee is that of the average prudent man, a bailee of goods is not liable for loss of the goods by theft in his shop if it is shown that he took as much care of the articles bailed as an ordinary prudent man would, under similar circumstances, take of his own goods of the same quality and value (m) For the same reason if A sends jewels to B for repairs, asking B to return them after repair as a value payable parcel and B does so, B is not liable for the loss of the jewels merely because he failed to insure the parcel Failure to insure the jewels is not evidence of want of such care as a man of ordinary prudence would, under similar circumstances, take of his own goods especially when the owner himself does not insure them when sending them out for repair (n) But it is negligence on the part of a carrier of goods to send jute in a boat with twenty or thirty leaks on its side, one or one and a half inches in length, and keep the goods in the hold of the boat for thirty hours (o)

The bailee's duty does not necessarily come to an end when the goods are lost or stolen In England a bailee for reward ought to take such steps, if any, as are reasonable and usual with a view to recovering the goods If he fails to do so, the burden of proof is on him to show that reasonable efforts would not have been successful (p)

**153.—A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment**

Termination of bailment by bailee's act inconsistent with conditions

*Illustration*

A lets to B for hire a horse for his own riding B drives the horse in his carriage This is at the option of A a termination of the bailment

It is well settled law that a wrongful use or disposal of the goods by the bailee determines the bailment and remits the bailor to the rights

judgment of Collins MR contain much valuable historical discussion which however we must not dwell upon here

(m) *Lakshmi Das v Babu Megh* (1900)

Punj Rec no 90

(n) *Boseck & Co v Maudleston* (1906)

Punj Rec no 70

(o) *Lakshmi Narain v The Secretary of State for India* (1913) 27 C W N 1017 80 I C 279 A I I 1924

Cal 97

(p) *Collman v Hill* [1919] 1 K B 413

and remedies of a person entitled to possession, a wrongful act means, for this purpose, a dealing wholly inconsistent with the terms of the bailment. The English authorities go into refinements as to the precise kind of wrong committed and the precise form of action available which are almost as subtle as anything in either European or Hindu philosophy, but, as these are intimately connected with the old common law system of pleading, we have no occasion to consider them here (g). Merely irregular exercise of a right, such as a sub pledge to a third person by a pledgee, or a premature sale by a pledgee with power of sale, has not the same effect (r). The present section has the merit of simplicity, and does not appear to have given rise to any litigation.

154.—If the bailee makes any use of the goods bailed, of which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

*Illustrations*

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

[By the common law this is not only a breach of the contract, but an independent wrong, so that a person who could not be sued on the contract, such as an infant, may be liable. *Burnard v Haggis* (1863) 14 C B N S 45.]

Illustration (b) is apparently suggested by the case put in old English books of a man borrowing a horse to ride to York and riding to Carlisle. (See 1 C B 681, 68 R R 805.) Discussion of the old forms of action being here superfluous, no comment is required.

(g) *Cooper v Ballmatt* (1815) 1 C B 72, 68 R R 793, *Fenn v Bittleston* (1851) 7 F & 152, 86 R R 593, *Donald v Suckling* (1860) L R 1 Q B 585, *Nyberg v Hantelvar* [1812] 2 Q B 202, C A, may be commended to the learned

reader desirous of pursuing the subject. And see Pollock on Torts, 13th ed 379-382.

(r) *Donald v Suckling*, last note, *Halliday v Holgate* (1864) 1 x Ch 1 R 31 x 2<sup>nd</sup>, 302.

155.—If the bailee, with the consent of the bailor, mixes

the goods of the bailor with his own goods,  
the bailor and the bailee shall have an interest  
in proportion to their respective shares in the  
mixture thus produced

This and the two following sections are clear enough. In England there is hardly any modern authority. In a case before the Court of Common Pleas in 1868 (s) a ship laden with cotton was wrecked and part of the cargo lost and the marks on a large proportion of the bales that were saved were so much obliterated by sea water that no bale could be identified as belonging to any particular consignee. The Court held that all the owners became tenants in common of the cotton which arrived at its destination in the proportion which the quantities respectively shipped by them bore to the whole quantity shipped. It will be observed that there was no question of bailment nor did the case otherwise resemble any of those dealt with in the present group of sections which do not mention accidental mixture at all. The Court added however — It has been long settled in our law that where goods are mixed so as to become undistinguishable by the wrongful act or default of one owner he cannot recover and will not be entitled to his proportion or any part of the property from the other owner. This severe rule, which the Contract Act has not adopted (s 157 next page) is advocated on moral grounds. Blackstone says Our law, to guard against fraud gives the entire property without any account to him whose original dominion is invaded and endeavoured to be rendered uncertain without his own consent (t). Similarly Kent adding however the qualification which corresponds to s 156 (next page) that this rule is carried no further than necessity requires and if the goods can be easily distinguished and separated as articles of furniture for instance then no change of property takes place. So if the corn or flour mixed together were of equal value then the injured party takes his given quantity and not the whole. This is Lord Eldon's construction of the old law (u).

(s) *Spence v Un on Marine Insurance*  
Co L R 3 C P 4<sup>th</sup> 437 438

Blackstone's style

(t) Comm 1 400 The clumsy locution endeavoured to be rendered is a strange exception to the usual elegance of

(u) Commentaries on American Law  
ii 360 Lord Eldon's dictum is in *Lupton v White* (1808) 10 Ves at p 442 10 P P at pp 101 10 A later reference

7. The Contract Act is in substantial agreement with the Roman law (v).

**156.**—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Effect of mixture, without bailor's consent, when the goods can be separated.

*Illustration.*

A bails 100 bales of cotton marked with a particular mark to B. B., without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark. A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales and any other incidental damage.

See on s. 155. The proposition is almost too obvious to need stating. Not only this, but any other difficulty caused by unauthorised acts of the bailee which may attend the return of the bailor's goods according to the contract must be at the bailee's risk and expense.

**157.**—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Effect of mixture, without bailor's consent, when the goods cannot be separated.

*Illustration*

A bails a barrel of Cape flour, worth Rs 15, to B. B., without A's consent, mixes the flour with country flour of his own, worth only Rs 25 a barrel. B must compensate A. for the loss of his flour

See on s. 155. By the Trusts Act, s. 66, "where the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him."

to this by *Stuart V. C.*, in *Cook v. Addison* (1869) L. R. 7 Eq. 466, 470, seems to add a new kind of "confusion" to the subject by assuming that goods and money are under identical rules. Mixture of funds, as it is called, is a wholly different thing from the *confusio* of corporeal goods.

Specifically deposited hoards of coin might, of course, get mixed, but such are not the cases that come before modern Courts of Equity. Cp. the note on s. 110, p. 530, b 10.

(c) L. ii 1, 27.

158.—Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

This and the next two sections represent Story's opinion partly of what the law is and partly of what it should be. The latter part of s 159 is in substantial accordance with an opinion of Paulus in the Digest (13, 6, 17, § 3). One does not quite see why in our law the bailee's promise may not be limited to returning the goods at a certain date or on demand after a certain date, if such is the agreement of the parties. The bailor may intend to accept a promise so qualified as the consideration for parting with the possession of the goods, and there is no known rule of law to prevent effect from being given to that intention. Why not let the parties make their own terms instead of borrowing a fixed rule from a system which has no doctrine of consideration? But the truth is that gratuitous bailments though very common in private life, are not matters of business and therefore do not come into court.

159.—The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if, on the face of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

No authority has been found for Story's view (w), which appears, as above stated, to be needlessly complicated. On principle the question is what the terms of the contract were. *Quare* whether an express contract not to recall a thing gratuitously lent before the expiration

(w) See Story, Bailments, § 258

of a certain time would not be good in British India notwithstanding this section. There is no difficulty about the consideration.

**160.**—It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Return of goods bailed, on expiration of time or accomplishment of purpose

Nothing is said here about the extent of the bailor's remedies if the goods are not forthcoming. He can have an action for damages against the bailee, but also he has further equitable rights. "If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished either being actually kept separate, or being mixed up with other moneys" (x).

"It has been established for a very long period that the principles relating to the following of trust property [compare the Trusts Act, ss 63—65] are equally applicable to the case of a trustee and to the case of factors, bailees, or other kinds of agents. . . . wherever a specific chattel is entrusted by one man to another, either for the purpose of safe custody or for the purpose of being disposed of for the benefit of the person entrusting the chattel, then either the chattel itself, or the proceeds of the chattel whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material" (y). The development of this doctrine in cases of trust is not within our scope; it is connected with the special application and limitation of the rules as to appropriation of payments (s 61, p 316, above).

It is obvious that in a case where the goods are found unfit for the purpose for which they were hired the purpose for which they were bailed is not accomplished, but the consequences are not here declared. It seems that all the bailee is bound to do is to give notice to the bailor of the default (z).

(x) *Jessel v. Hall* (1871) 13 Ch. Div. 510. (y) *The Fuller*, *Hayes v. Strahan* (1871) 13 Ch. Div. 510. (z) *The Fuller*, *Hayes v. Strahan* (1871) 13 Ch. Div. 510.

61.—If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods that time (a)

unexplained failure to return the thing bailed is presumed to be bailee's default (b)

conversely, if a bailor or consignee omits or refuses to take his goods at the proper time from a carrier (or, it would seem, any other person acting as a bailee) who is ready and willing to deliver them, he may be liable to compensate the bailee for any necessary expenses of and incidental to their safe custody (c)

162.—A gratuitous bailment is terminated by the death either of the bailor or of the bailee

the executors of persons who have borrowed things, especially where the goods are of great value, do not always remember this, as is shown by common experience. On the other hand, the executors of a lender may tacitly and discreetly, in many cases, treat the loan as a gift without fear of being called to account for a *devastavit*. The problems hence arising, if any, seem to be more ethical than legal, save so far as the law of limitation cures this and other irregularities. The present section does not, of course, release the bailee's estate from liability for any default in his life (cc)

16

*Jones* (1847) 10 L. J. O. S. 231  
770, does not really lay down any rule

as to railway contracts, see the Railways Act IV of 1890 s. 72 recent example *Arjun Das Hariram v. State* (1923) 83 I. C. 786, 1925 Cal. 737

(b) *Kush Kanta Barakati v. Chandra Kanta Barakati* (1923) 25 C. W. N. 1041 83 I. C. 151, where the English authorities on which this section is founded are cited at some length (hire of elephant,

some complication as to the parties to the contract)

(c) *G. N. L. Co. v. Swaffield* (1874) 1 R. 9 F. x. 132 following and extending to carriers by land the decision of the Judicial Committee as to the rights of the master of a ship where a cargo is left on his hands at the port of arrival *Cargo ex Argos* (1872) 1 I. L. 5 P. C. 134

(cc) *Lucknow Municipal Board v. Abdul Hamid* (1929) 5 Luck. 220

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(z) *J. v. Hall* (1841) 11 C. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

(y) *See* *the* *Indian* *Contract* *Act* *1872* *Section* *160* *and* *161* *and* *162* *and* *163* *and* *164* *and* *165* *and* *166* *and* *167* *and* *168* *and* *169* *and* *170* *and* *171* *and* *172* *and* *173* *and* *174* *and* *175* *and* *176* *and* *177* *and* *178* *and* *179* *and* *180* *and* *181* *and* *182* *and* *183* *and* *184* *and* *185* *and* *186* *and* *187* *and* *188* *and* *189* *and* *190* *and* *191* *and* *192* *and* *193* *and* *194* *and* *195* *and* *196* *and* *197* *and* *198* *and* *199* *and* *200* *and* *201* *and* *202* *and* *203* *and* *204* *and* *205* *and* *206* *and* *207* *and* *208* *and* *209* *and* *210* *and* *211* *and* *212* *and* *213* *and* *214* *and* *215* *and* *216* *and* *217* *and* *218* *and* *219* *and* *220* *and* *221* *and* *222* *and* *223* *and* *224* *and* *225* *and* *226* *and* *227* *and* *228* *and* *229* *and* *230* *and* *231* *and* *232* *and* *233* *and* *234* *and* *235* *and* *236* *and* *237* *and* *238* 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61.—If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods that time (a).

unexplained failure to return the thing bailed is presumed to be bailee's default (b)

conversely, if a bailor or consignee omits or refuses to take his part at the proper time from a carrier (or, it would seem, any other kind of bailee) who is ready and willing to deliver them, he may be held to compensate the bailee for any necessary expenses of and incidental to their safe custody (c)

162.—A gratuitous bailment is terminated by the death either of the bailor or of the bailee

the executors of persons who have borrowed things, especially do not always remember this, as is shown by common experience. On the other hand, the executors of a lender may tacitly and discreetly, in many cases, treat the loan as a gift without fear of being called to account for a *devastavit*. The problems hence arising, if any, seem to be more ethical than legal, save so far as the law of limitation cures this and other irregularities. The present section does not, of course, affect the bailee's estate from liability for any default in his life (cc)

*Jones* (1847) 10 L J O S 231, 770, does not really lay down any rule

as to railway contracts, see the Railways Act IX of 1890 s 72 recent example *Arjundas Hariram v State* (1925) 83 I C 786, 1925 Cal 737

(b) *Kush Kanta Dalkalats v Chandra Kanta Kalkats* (1923) 28 C W N 1041, 83 I C 151, where the English authorities on which this section is founded are cited at some length (hire of elephant,

some complication as to the parties to the contract)

(c) *G A R Co v Swaffield* (1874) 1 R 9 Ex 132, following and extending to carriers by land the decision of the Judicial Committee as to the rights of the master of a ship where a cargo is left on his hands at the port of arrival *Cargo ex Argos* (1872) L R 5 P C 134

(cc) *Lucknow Municipal Board v Abdul Harzagh* (1929) 5 Luck 220

of a certain time would not be good in British India notwithstanding this section. There is no difficulty about the consideration.

**160.**—It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, *without demand* as soon as the time for which they were bailed has expired or the purpose for which they were bailed has been accomplished.

Return of good  
bailed on expira-  
tion of time or  
accomplishment of  
purpose

Nothing is said here about the extent of the bailor's remedies if the goods are not forthcoming. He can have an action for damages against the bailee but also he has further equitable rights. If the bailee sells the goods bailed the bailor can in equity follow the proceeds and can follow the proceeds wherever they can be distinguished either being actually kept separate or being mixed up with other moneys (x).

It has been established for a very long period that the principles relating to the following of trust property [compare the Trusts Act ss 63—65] are equally applicable to the case of a trustee and to the case of factors, bailees or other kinds of agents

wherever a specific chattel is entrusted by one man to another either for the purpose of safe custody or for the purpose of being disposed of for the benefit of the person entrusting the chattel then either the chattel itself or the proceeds of the chattel whether the chattel has been rightfully or wrongfully disposed of may be followed at any time although either the chattel itself or the money constituting the proceeds of that chattel may have been mixed and confounded in a mass of the like material (y). The development of this doctrine in cases of trust is not within our scope. It is connected with the special application and limitation of the rules as to appropriation of payments (s 61 p 316 above).

It is obvious that in a case where the goods are found unfit for the purpose for which they were hired the purpose for which they were bailed is not accomplished but the consequences are not here declared. It seems that all the bailor is bound to do is to give notice to the bailor of the default (z).

(x) *Jewel v. United States Trust Co.*

(18) *113 Cl. D. 500*

(y) *113 Cl. D. 500*

(z) *113 Cl. D. 500*

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Conversely, if a bailor or consignee omits or refuses to take his goods at the proper time from a carrier (or, it would seem, any other person acting as bailee) who is ready and willing to deliver them, he may be liable to compensate the bailee for any necessary expenses of and incidental to their safe custody (c)

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The executors of persons who have borrowed things, especially things of value, do not always remember this, as is shown by common experience. On the other hand, the executors of a lender may tacitly and discreetly, in many cases, treat the loan as a gift without fear of being called to account for a *devastavit*. The problems hence arising, if any, seem to be more ethical than legal, save so far as the law of limitation cures this and other irregularities. The present section does not, of course, release the bailee's estate from liability for any default in his life (cc)

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(cc) *Lucknow Municipal Board v. Abdul Haqq* (1920) 5 Luck. 220

**163.**—In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Bailor entitled to increase or profit from goods bailed

*Illustration*

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

Good sense, and therefore good law, seemingly without any previous reported authority. New shares allotted in respect of shares that have been pledged are an increase claimable by the pledgor (d).

**164.**—The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

Bailor's responsibility to bailee

If the terms of the bailment are such that its natural determination, as between the parties is delivery over to a third person, and there is a paramount title elsewhere, the bailee may be in difficulties, which, however, are mitigated by s 166.

**165.**—If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailment by several joint owners

"May," not "must" (e). Even if there is an agreement to the contrary, one of several joint owners cannot, after having accepted redelivery from the bailee, sue him jointly with the other owners, for "one party to a contract cannot maintain an action for a breach occasioned by his own act, and neither can three parties maintain an action unless each party separately could" (f). Dr Whitley Stokes

(d) *Motilal Hyabhai v Bis Mani* (1833) 11 A & F 209, 52 R R 721. It does not appear what was the character of the defendant's possession.  
(1924) 1 R 52, 1 A 137, 49 Bom 233, 86 I C 368, A I R 1925 P C 86.  
(e) *May v Harref* (1811) 13 East, 197, 12 R R 322. In *Broadbent v Leeward* (1837) 7 I & B 331, 110 R R 574.

charges this section with contradicting all known laws, but *quære* whether he attended sufficiently to the difference made by the enactment being only permissive

**166.**—If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery

Bailee not responsible on redelivery to bailor without title

**Return of goods to or to the order of the bailor**—A bailee who in good faith returns the goods bailed to the bailor or his order is not liable to the true owner of the goods. N entrusted certain bales of cotton to L, a muccadam (warehouseman). L pledged the cotton with B (with whom he had dealings for several years) to secure advances made by B to L. Subsequently L redeemed the pledge and the cotton was returned by B to or to the order of L. N sued B and L claiming delivery of the goods or their value. The Judicial Committee held that whether the pledge by L to B was or was not valid under s 178, the return of the goods by B in good faith to L was a complete defence to the suit (g). The section really applicable was the present section, but the case was wrongly argued as under s 178, which it was held unnecessary to consider.

**Estoppel of bailee**—Cp the Evidence Act I of 1872, s 117—  
“Nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.  
*Expl 2* If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.”

The rule of the Common Law is that generally a bailee is estopped from denying his bailor's title. He is not only justified in delivering to the bailor or according to his directions, but he is not justified in refusing to deliver to the bailor unless he is under the effective pressure of an adverse claim, and defends upon the right and title and by the authority of the third person so claiming. There must be something equivalent

5.

**163.**—In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed

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(d) *Motilal Hirabhai v. Basant* (1811) 11 A C F 209 521 R 721 R (1924) L. R. 121 A 137, 19 Bom 233 does not appear what was the character of the defendant's possession  
561 C 308 A I R 1951 C 86

(e) *May v. Harrold* (1811) 131 Ast 107 (f) *Brand v. Scott* (1817) 71 C B 12 R R 300 In *Brook v. Leeward* 374 110 R 1 571

charges this section with contradicting all known laws, but *quære* whether he attended sufficiently to the difference made by the enactment being only permissive

166.—If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery

**Return of goods to or to the order of the bailor.**—A bailee who in good faith returns the goods bailed to the bailor or his order is not liable to the true owner of the goods. N entrusted certain bales of cotton to L, a muccadam (warehouseman). L pledged the cotton with B (with whom he had dealings for several years) to secure advances made by B to L. Subsequently L redeemed the pledge, and the cotton was returned by B to or to the order of L. N sued B and L claiming delivery of the goods or their value. The Judicial Committee held that whether the pledge by L to B was or was not valid under s 178, the return of the goods by B in good faith to L was a complete defence to the suit (g). The section really applicable was the present section but the case was wrongly argued as under s 178, which it was held unnecessary to consider

**Estoppel of bailee**—Cp the Evidence Act I of 1872, s 117 —  
“ Nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license  
Expl 2 If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor ”

The rule of the Common Law is that generally a bailee is estopped from denying his bailor's title. He is not only justified in delivering to the bailor or according to his directions, but he is not justified in refusing to deliver to the bailor unless he is under the effective pressure of an adverse claim, and defends upon the right and title and by the authority of the third person so claiming. There must be something equivalent

(g) *Bank of Bombay v Nandlal Thackerseydass* (1912) L R 40 I A 1 37 Bom 127 17 I C 663

to an eviction by a paramount title, which if it actually took place would of course determine the bailment (*h*) But if the bailor has by his own act, as by mortgaging the thing bailed, made it impossible for the bailee to redeliver to him without being exposed to an action at the suit of a third person, then the bailee is excused (*i*)

But if a man accepts a bailment with notice at the time of an adverse claim, he must stand by the election he has made, and cannot afterwards rely on the adverse title against his bailor (*j*)

A common carrier's position is not quite the same, as he must in any case accept goods offered him for carriage and cannot make inquiries as to the ownership He may safely deliver in pursuance of his employment until he has notice of an adverse claim, but after notice he would so deliver at his peril, and therefore is justified in delivering to the real owner (*k*)

If a warehouseman, or other such like person having the custody of goods, acknowledges that he holds them at the order of a certain person, he thereby makes himself that person's bailee, and is estopped from denying his title to the same extent as if he had actually accepted delivery from him (*l*)

**167.**—If a person, other than a bailor, claims goods bailed he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

Right of third  
person claiming  
goods bailed

The bailee's protection against conflicting claims appears to be left to the general directions of the Code of Civil Procedure In England the bailee can take refuge with the Court by interpleading (*m*)

(*h*) *Biddle v Bond* (1865) 6 B & S 225, approved by C A in *Pogers, Sons & Co v Lambert & Co* [1891] 1 Q B 318, 325 This doctrine does not extend to a change of title, in other kinds of transactions, by assignment or operation of law *Kingsman v Kingsman* (1880) 6 Q B Div 122

(*i*) *European and Australian Poynt Mail Co v Royal Mail Steam Packet Co* (1861) 30 L J C P 247 This is really the application of a wider principle See ss 53 and 67, pp 318, 350, above

(*j*) *Ex parte Davies* (1841) 10 Ch Div

86

(*k*) *Sheridan v New Quay Co* (1858) 4 C B N S 618, 114 R R 873, followed in *Eagleton v F I F Co* (1872) 8 B L R 581, 606 The Court of Common Pleas preferred Story's earlier to his later opinion

(*l*) *Henderson & Co v Williams* [1835] 1 Q B 621, C A

(*m*) It is sufficient to refer to the judgment of Lindley L J in *Pogers, Sons & Co v Lambert & Co* [1891] 1 Q B 318,

327

168.—The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation, and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

Right of finder of goods, may sue for specific reward offered

By the Common Law a person who finds lost goods and holds them with the intention of saving them for the true owner is certainly not a trespasser, and has no higher duties than a bailee (*n*), but, the service being rendered without request from the owner, he does not seem entitled to any remuneration unless a specific reward has been offered for the return of the goods, and the offer has come to his knowledge (see p 56, above), and if he cannot claim compensation there is no ground on which he can retain the goods. But it seems the Court would be astute to lay hold of any evidence which might constitute a cause of action for a meritorious finder who had been at substantial pains, and it is possible that in some cases he might have rights analogous to a salvor's (*o*). It appears to have been a current opinion as late as the seventeenth century that a finder could abandon the goods with impunity (*p*).

The rule of the present section appears to be intended to satisfy natural justice. Presumably the compensation, if no specific reward has been offered and the parties cannot agree is to be what the Court considers reasonable. If the parties do agree the owner's promise of reward may be binding under s 25 sub s 2 (p 190 above). See *Storey, Bailments*, § 1214.

169.—When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon

When finder of thing commonly on sale may sell it

(*n*) *Isack v Clark* (1615) 2 Pal tr at p 312 fully cited by Sir P S Wright in Pollock and Wright on Possession at p 177.

L1 254 3 P P 374

(*p*) *Isack v Clark* (1615) 2 Pal tr at p 312, fully cited by Wright on Possession at p 177.

(*c*) *Isack v Clark* (1773) 2 H

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(*l*) *Henderson & Co v Wallis & Co* [1835] 1 Q B 521, C A

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(p) *Isaack v Clark* (1615) 2 Bulstr at p 312, Pollock and Wright on Possession at p 177.

(o) *Nicholson v Chapman* (1793) 2 H

demand, to pay the lawful charges of the finder, the finder may sell it—

(1) When the thing is in danger of perishing or of losing the greater part of its value, or,

(2) When the lawful charges of the finder, in respect of the thing found, amount to two thirds of its value

This section is taken from the New York Draft Civil Code, s 913 where it is stated to be a new provision. It does not appear to have come before the Indian Courts. At Common Law sale by the finder would be a conversion.

**170.**—Where the bailee has, in accordance with the

Bailee's part: purpose of the bailment, rendered any service  
 singular lien involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them

#### *Illustrations*

(a) A delivers a rough diamond to B a jeweller to be cut and polished which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B a tailor to make into a coat. B promises A to deliver the coat as soon as it is finished and to give A three months' credit for the price. B is not entitled to retain the coat until he is paid.

**Principle of bailee's lien**—This section expresses the "Common Law principle that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid" (g)

"Where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the

(g) Best CJ in *Bevan v Waters* (1824) 3 Car & I 200 33 R R 692. Not if he has kept the thing beyond the agreed time or a reasonable time for the completion of the work at which he failed to complete it. *Judah v Emperor* (1851) 17 Cal 174 90 I C 250. A I J 10 P Cal 464 (in such case bailor does not commit theft by retaining the goods).

animal is cured of a disease, or the horse breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges" (r) An agister, who merely takes in an animal to feed it, is not entitled to a lien, as not coming within this principle, for he does not confer any additional value on the thing entrusted to him (s)

Further, where a person does work on goods delivered to him under an entire contract, the fact that the deliveries are at different times does not affect his right to a lien on all goods dealt with under that contract (t) Accordingly, where jute was delivered to a pressing company from time to time to be baled, but all under one contract, the lien was held to attach to all such goods (u)

A bailee for reward cannot transfer his lien to a sub contractor without the bailor's authority (v)

**Contract to the contrary.**—Where there is an express contract to do certain work for a specified sum of money, there is no room for a *quantum meruit* claim. A person, therefore, to whom an organ is delivered for repairs for a certain sum is not entitled to retain it as security for a sum of money claimed not under the contract, but for work done (w) While the special contract is in force there is no other "due remuneration" than the sum expressly contracted for

**171.—Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them, but no other persons have a right to retain, as a security for such balance, goods**

General lien of  
bankers, factors,  
wharfingers attor-  
neys, and policy  
brokers

(r) *Parke B. in Scarfe v Morgan* (1838) 4 M & W 270 283 51 R R 568 578

(s) *Jackson v Cummins* (1839) 5 M & W 342, 5<sup>o</sup> R R 737 *Chanda Mal v Gonda Singh* (1885) *Punj Rec* no 60 In England an innkeeper has a lien on goods brought into the inn by a guest this is on the distinct ground that he is bound by law to accept them See 1 Sm L C 131, 13th ed As to the peculiar position of a distrainer at common law

who does not acquire possession at all see *Turner v Ford* (1846) 15 M & W 212, 71 R R 624, *Iollock and Wright on Possession* 82 202

(t) *Chase v Westmore* (1816) 15 M & S 180 17 R R 301

(u) *Miller v Nasmyth's Patent Press Co Ltd* (1882) 8 Cal 312

(v) *Pennington v Reliance Motor Works* [1923] 1 K B 127

(w) *Skinner v Jager* (1883) 6 All 1394

bailed to them, unless there is an express contract to that effect.

**General as distinct from particular lien : Bankers.**—This “general lien,” as it is called by way of distinction from the “particular lien” of an artificer for work done by him on the particular goods in question (x), was originally established in England, as regards bankers and others, as a proved usage of trade, but, once being so established, it became part of the law merchant, and as much to be judicially noticed as any other part of the law (y). The right does not extend to securities or other valuable property deposited with a banker merely for safe custody or for a special purpose (z), and thus on the ground that the limited and special purpose must be deemed to imply a contract to the contrary, which seems to account for the absence from the text of any words expressly making an exception in such cases (a). Where a member of a firm deposited a lease to secure a particular advance to the firm, it was held that the banker had no lien for the general balance due from the firm (b). Nor does the lien of a banker extend to title deeds casually left at the bank after a refusal by him to advance money on them (c), and where a deed dealing with two distinct properties, was deposited with a memorandum charging only one of the properties with a specified sum and also the general balance due to the banker it was held that he had no lien on the other property comprised in the deed (d).

But, in order that the general lien may be excluded by a special agreement, whether express or implied from the circumstances, the agreement must be clearly inconsistent with the existence of such a lien (e). Accordingly a deposit of valuables with a banker to secure debts of a customer due to him as banker is subject to the bankers' lien

(x) A general lien is the right to retain the property of another for a general balance of accounts, but a particular lien is a right to retain it only for a charge on account of labour employed or expenses bestowed upon the identical property detained. Kent, Comm. ii. 634.

(y) *Imperial Bank v. Long* (1840) 12 Cl. & F. 787, 19 R. R. 204 per Lord Campbell and Lord Erskine.

(z) See *Ch. West v. P. & S. Ind. & C.* [1890] 2 Ch. 226, C.A.

(a) So as to a bank specially est-

marked for remittance abroad. *Mer- cantile Bank of India v. Peshwa* G. L. 1895 1 C. 758. A. I. R. 1926 Sinl 225.

(b) *Wolstenholme v. Sheffield Bank* (1880) 51 L. T. 746.

(c) *Lyons v. Darrin* (1817) 7 Taunt. 278, 18 P. 1. 480.

(d) *Halle v. Lifford* (1844) 33 L. J. Ch. 21.

(e) *Franklin v. Barnett* (1840) 12 Cl. & F. 787. C. P. P. 204. *Agarwal v. Chandra* (1872) 1 L. S. C. 41.

for the customer's general debts to him unless the customer can prove an agreement to give up his general lien (*f*) Such an agreement may be evidenced, for example, by a memorandum of charge declaring that the deposit is to secure overdrafts not exceeding a named amount This excludes the banker's lien for any greater amount (*g*) As to boxes or sealed parcels deposited with a banker for custody without informing him of their contents or making them accessible to him, he has no lien on them even if the customer is in the habit of leaving other securities with the banker against advances (*h*)

A banker's lien, when it is not excluded by special contract, express or implied, extends to all bills, cheques, and money entrusted or paid to him, and all securities deposited with him, in his character as a banker (*i*) In the case of money and negotiable securities, the lien is not prejudiced by any defect in the title of the customer, nor by equities of third persons, provided the banker acts honestly and without notice of any defect of title (*j*) But there is no lien for advances made after notice of a defect in the customer's title (*k*), or after notice of an assignment of the moneys or securities in the banker's hands (*l*) And in the case of securities which are not negotiable, the lien is confined to the rights of the customer herein, and is subject to all equities affecting them at the time when the lien attaches (*m*)

**Factor.**—A factor "is an agent entrusted with the possession of goods for the purpose of sale" (*n*) He may buy and sell either in his own name or in that of the principal, though "he usually sells in his own name, without disclosing that of his principal" The factor is said

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| <p>(<i>f</i>) <i>Kunhan v Bank of Madras</i> (1895) 13 Fast, 135 12 R R 341 <i>Locke v</i> 19 Mad 234, <i>Official Assignee of Madras v Ramaswami Chetty</i> (1920) 43 Mad 747, 59 I C 475</p> <p>(<i>g</i>) <i>Re Bowes</i> (1886) 33 Ch D 586</p> <p>(<i>h</i>) <i>Lease v Martin</i> (1873) L R 17 Eq 224</p> <p>(<i>i</i>) <i>Misa v Currie</i> (1876) 1 App Cas 554, <i>London Chartered Bank v White</i> (1879) 4 App Cas 413</p> <p>(<i>j</i>) <i>Bank of New South Wales v Goulburn Butter Factory</i> [1902] A C 543, <i>Misa v Currie, supra</i> <i>Brandao v Barnett</i> (1846) 12 Cl &amp; F 78 69 R L 204</p> <p>(<i>k</i>) <i>Solomons v Bank of England</i> (1810)</p> | <p>13 Fast, 135 12 R R 341 <i>Locke v</i> 19 Mad 234, <i>Official Assignee of Madras v Ramaswami Chetty</i> (1920) 43 Mad 747, 59 I C 475</p> <p>(<i>l</i>) <i>Jeffreys v Igra Lank</i> (1866) 1 R 2 F q 674</p> <p>(<i>m</i>) <i>London and County Bank v Alcock</i> (1851) 6 App Cas 722</p> <p>(<i>n</i>) <i>Cotton LJ in Stevens v Blier</i> (1883) 25 Ch Div 31 37, <i>Emperor v Parakh</i> (1925) 1 Luck 133 92 I C 744, A I R 1926 Oudh 202 (motor-car dealer entrusted with car for sale committed no offence by refusing to return the car to the Court of Wards, under whose management the client's estate had come, without payment of his account)</p> |
|---|---|

to have a "special property" in the goods consigned to him (o) Private instructions to sell only in the principal's name or within fixed limits of price will not make him the less a factor or deprive him of his claim to lien (p) The secretaries and treasurers of a company who have made advances to the company and incurred expenses and made disbursements on behalf of the company in the conduct of its business, are not factors, and are not entitled to any lien on the property of the company in their possession (q) Similarly a banian in Calcutta has no lien for a general balance of account in the absence of an express contract to that effect (r) Though advances made by a factor for sale confer a lien on him, they do not confer upon him the right to sell *in toto domino* To claim such a right there must be an agreement either express or to be inferred from the general course of business or from the circumstances attending the particular consignment (s)

Conformably to the principle governing all general liens, a factor's lien, where it exists, applies only to debts due to the factor in that character, it does not extend to "debts which arise prior to the time at which his character of factor commences" (t) But it extends to all his lawful claims against the principal as a factor, whether for advances, or remuneration, or for losses or liabilities incurred in the course of his employment in respect of which he is entitled to be indemnified (u)

In order that the lien may attach, the goods must come into the possession, actual or constructive (v), of the factor If, for instance, a factor accepts bills on the faith of a consignment of goods which, by reason of the bankruptcy of the principal, are never received by him, he has no lien on the goods as against the principal's trustee in bankruptcy (w) Nor does the lien extend to goods acquired otherwise than

(o) *Baring v Corrie* (1818) 2 B & Ald 137, per Abbott C J at p 143 Holroyd J at p 148, 20 R R 383

(p) *Stevens v Buller* (1883) 25 Ch Div 31, 37

(q) *In re Bombay Saw Mills Co* (1859) 13 Bom 314 320

(r) *Peacock v Baynath* (1831) 18 Cal 577, L R 18 I A 78

(s) *Jafferbhoy v Charlesworth* (1833) 17 Bom 520 512

(t) *Houghton v Matthews* (1803) 3 B & P 485 489, 7 R R 815 816

(u) *Hammonds v Barclay* (1802) 21 ast, 227, where the principal died during the currency of certain bills accepted by the factor on the faith of a consignment of goods, *Drinkwater v Goodwin* (1775) Cowp 251 (liability incurred by the factor as surety for the principal)

(v) *Bryans v Aiz* (1839) 4 M & W 775, 51 P R 829 And see *Fulcher v Comptoir d'Escompte* (1876) 1 Q B D 701

(w) *Arnlock v Craig* (1700) 3 T R 119 783, 1 R R 661

in his character of a factor (x), or entrusted to him with express directions or for a special purpose inconsistent with the existence of a general lien (y) Instructions to provide, out of the proceeds of a consignment, for a bill of exchange drawn by the principal on the factor in favour of a third person will exclude the factor's general lien unless he pays the bill of exchange (z)

**Wharfingers** —The lien of a wharfinger is, generally speaking, only effective as regards claims against the owner of the goods He has no lien as against a buyer for charges becoming due from the seller after he has had notice of the sale (a), and where it was agreed between a buyer and seller, before the goods sold came to the hands of the wharfinger, that the contract of sale should be rescinded, it was held that he had no lien as against the seller for a general balance due to him from the buyer (b)

Owners of a screwhouse who have a wharf as an accessory are not wharfingers (c)

**Attorneys** —In England a solicitor has a lien on his client's documents (not only deeds and law papers) (d) entrusted to him as solicitor (e) "for all taxable costs, charges and expenses incurred by him as solicitor for his client, but he has no lien for ordinary advances or loans His taxable costs, charges, and expenses would include money payments which he makes for his client in the course of his business, such as counsel's fees" (f) Taking a special security from

(x) *Dixon v Stansfeld* (1850) 10 C B 398 84 R R 631 (where a factor insured a ship on the principal's behalf it was held that his general lien did not extend to the policy of insurance)

(y) *Spalding v Ruding* (1843) 6 Beav 376 63 R R 190 (bill of lading pledged to factor for specific amount) *Burn v Brown* (1817) 2 Stark 272 19 R R 719 (certificate of ship's registry entrusted to factor for the purpose of paying duties at custom house)

(z) *Frith v Forbes* (1862) 4 De G F & J 409 135 R R 217, *Colvin v Hartwell* (1837) 5 Cl & F 484

(a) *Barry v Longmore* (1840) 12 A & E 639, 54 R R 624

(b) *Richardson v Coss* (1802) 3 B & P 119 6 R R 727

(c) *Muller v Vassilj's Patent Press Co* (1882) 8 Cal 312

(d) *E.g. cheques General Share Trust Co v Clapman* (1876) 1 C P D 771

(e) *Sheffield v Eden* (1878) 10 Ch Div 291 (solicitor mortgagee has no lien on mortgage deed for costs of mortgage here the deed is not the client's property at all) *Champernown v Scott* (1821) 6 Mad 92 22 R R 248 13 Lnc Laws of Engl 2nd ed 491 s r *Solicitor* which see for details of English practice on the subject

(f) *Lindley L.J., Re Taylor Stillman, and Underwood* [1891] 1 Ch 590, 596,

the client is not necessarily an abandonment of the general lien, but it will be so if the circumstances are inconsistent with the continuance of the lien, and if the solicitor does not expressly reserve his lien an intention to waive it will generally be inferred, having regard to the solicitor's duty to give his client full information (g)

A solicitor who is discharged by his client holds the papers entrusted to him subject to his lien for costs, and the lien extends also to translations of documents made by the Court's translator at his expense (h). If, however, a solicitor discharges himself (i), he is not, according to English law, entitled to a lien, and the same law applies in India. Sec 1 saves usages and customs of trade not inconsistent with the provisions of this Act, and the usage of trade of attorneys sanctioned by English law is not inconsistent with this section. Applying this reasoning, it was held by the Calcutta High Court that a dissolution of a firm of solicitors operates as a discharge of the client who employs them, and the attorneys are not entitled to retain the papers until their costs are paid (j).

The kinds of lien dealt with in this Act are as follows :—

- (1) Lien of finder of goods (s 168, p 535, above),
- (2) Particular lien of bailees (s 170, p 536, above),
- (3) General lien of bankers, factors, wharfingers, High Court attorneys and policy brokers (s 171, p 541 above),
- (4) Lien of pawnees (ss 173, 174 pp 544, 545, below), and
- (5) Lien of agents (s 221, p 618, below),

Some further comments with regard to liens, general and particular, of agents and sub agents, and to the modes in which such liens may be extinguished or lost, will be found at pp 618—623, *post*

As to lien of railway administration, see Railways Act IX of 1890, s 55

all such claims against the client as the taxing master has to consider, per Kay L J, at p 599

(g) *Ib.*, at pp 597, 601. *See Deighton v Norman & Co* [1898] 1 Ch 199. The leading earlier authorities are *Correll v Simpson* (1809) 18 Ves 270, 10 P 1 181, and *Stevenson v Fieldwick* (1813) 1 M & S 73, 141 1 73

(h) *Lane vesterley v Varranyi* (1880) 4

Bom 303

(i) An attorney who declines to act further for a client unless costs already incurred are paid discharges himself. *Jagdish Kumar v Kusum Kumar* (1902) 4 C W N 767. *Udai Chandra Mukerjee v Shashree Bhowan* (1904) 6 C W N 217

(j) *Per McCracken* (1880) 6 Cal 1. *See also Le M...* (1866) 1 R 214 317

The sections of the Indian Contract Act relating to lien are not exhaustive, and do not negative the existence of lien in cases not specified therein. On general principles, and in the absence of any direct provision to the contrary, an arbitrator has a lien on his award for the payment of his reasonable charges (k)

## *Bailments of Pledges*

**172.**—The bailment of goods as security for payment of a debt or performance of a promise is called “pledge”. The bailor is in this case called the “pawnor”. The bailee is called the “pawnee”.

[Bankers by agreement with a customer who has purchased goods to be paid for by drafts in the usual manner honour the drafts and receive and store the goods the customer taking delivery and paying for the goods taken from time to time. As to any goods remaining in the bank's custody unpaid for the bank is a pawnee and not a mere bailee and has the right of sale given by s 176] (l)

The section affirms the Common Law. The bailee under a contract of pledge does not become owner but as having possession and right to possess he is said to have a special property (m). Any kind of goods, documents or valuable things of a personal nature may be pledged (n). Delivery is necessary to complete a pledge it may be actual or constructive and it is sufficient if the thing pledged is delivered under the contract within a reasonable time of the lender's advance being made (o). Government promissory notes may be pledged, but this must be done as required by statute by endorsement and delivery (p). The rules of delivery and the like which are generally applicable to

(k) *In re Cyril Kirkpatrick* (1897) Punj Rec no 22. The analogy between a seller of goods and an arbitrator suggested by Roe C J. to bring the arbitrator's case within s 95 of the Act seems to be far fetched.

(l) *Alliance Bank of Smla v Ghamandi Lal-Jaini Lal* (1927) 8 Lah 373 101 I C 725 A I R 190 Lah 408. The right must of course be exercised regularly with proper demand and notice as mentioned below under that section.

(m) See per Bowen L J, *Ex parte Hubbard* (1886) 17 Q B Div at p 698.

(n) 10 Enc Laws of Engl 2nd ed 640 citing Story.

(o) *Hilton v Tucker* (1888) 39 Ch D 669. *Jyoti Prakash v Mukti Prakash* (1917) 27 C W N 297.

(p) *Jyoti Prakash v Mukti Prakash* (1917) 22 C W N 297. See also *Neckram Doba v Bank of Bengal* (1891) 19 Cal 300 L R 19 I A 60 a case of pledge of Government securities.

bailments are applicable here. A pawnee may redeliver the goods to the pawnor for a limited purpose without thereby losing his rights under the contract of pledge, as for the purpose of enabling the pledgor to sell the goods on the pledgee's behalf (q). If the pawnee, however, abuses his authority in such a case by selling or pledging afresh on his own account to a third person who gives value in good faith, the pawnee is not entitled to the goods as against that person, who has received possession from an owner lawfully in possession, though using his possession fraudulently (r).

According to mercantile usage found to obtain in the city of Amritsar, if a person leaves goods with another and then borrows money from him, the loan is to be understood to be made on the security of the goods, so that if the loan is not repaid the creditor may sell the goods and appropriate the proceeds of the sale towards his debt (s).

It is clear from the definition of "bailment" (s 148 above) that there can be no pledge of goods unless there is an actual delivery of the goods. A loan, however, may be secured by a hypothecation of goods. Such a transaction does not require delivery of goods for its validity, nor can it be said to be prohibited by the Contract Act because the Act contains provisions for bailments of pledges and none for hypothecation of goods (t).

**173.**—The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

The pawnee makes himself a wrongdoer if he persists in holding the goods after tender of all that is due. In that event his "special property" is determined by his wrongful refusal of a tender properly made, and the pawnor can recover the goods (u).

(q) *North Western Bank v Lloynter, Son & Macdonalds* [1895] A C 56

(r) *Lubbock v Lawson* (1880) 5 Q B D 284

(s) *Parthi Mal v G J S Nith* (1886) Punjab Dec no 34

(t) *Hirajali v Anath Nath Dey* (1918) 22 C W N 758, 41 I C 211

(u) Settled law. See the Judicial Committee per Lord Macnaghten, *Bank of New South Wales v O'Connor* (1880) 14 App Ca 273, 282

174.—The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged : but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee

Pawnee's right to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances

This section does not appear to need any comment, except that the presumption mentioned at the end does not apply to advances made on a new and different security (t)

175.—The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged

Pawnee's right as to extraordinary expenses incurred

“Receive.”—Note that the word is not “retain,” as in the two preceding sections, but “receive.” A pawnee has, therefore, no right of lien for “extraordinary” expenses, as he has in the case of “necessary” expenses (s 173) but has only a right of action in respect of them. As an example of the expenses contemplated by this section, Dr Whitley Stokes (in “The Anglo Indian Codes”) suggests “the cost of curing a pawned horse which meets with an injury by accident.” There does not appear to be any distinct English authority. See, however, Kent’s Commentaries, ii 579

176.—If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security, or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale

Pawnee's right where pawnor makes default

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to

(v) *Cowasji v Official Assignee* (1928) 30 Bom L R 1310, 115 I C 389, A I R 1928 Bom 545

pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

**Pawnee's rights.**—The substance of this section is familiar and well settled English law. It is sufficient to cite one or two modern dicta. "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor) although the pledgor may redeem at any moment up to sale" (w). After sale it is the pawnee's ordinary right "to recover the balance of the loan unsatisfied on the sale of the pledge" (x).

Where no time is originally stipulated for payment, it seems that "the debtor is not in default until notice is given by the creditor that he requires payment on a certain day, and that day is past. The debtor is then in default, and is in the same position as if a day for repayment had been fixed in the original contract" (y).

It must be observed that the contract of pledge differs essentially from that of mortgage. A mortgagee does acquire general property in the thing mortgaged, subject to the mortgagor's right to redeem. Foreclosure is a judicial determination of a defaulting mortgagor's right, whereby the mortgagee's property becomes absolute. A pawnee, not being the legal owner, is not entitled to foreclose, but has only power to sell (z), and authorities on mortgage transactions are to be applied in cases of pledge, if at all, only with great caution.

**"May sell the thing pledged."**—The power conferred on the pledgee under this section to sell the property without reference to the Court does not take away his right to sue the pawnor on the debt or bring a suit for the sale of the property pledged to him (a). There is nothing in the Act to forbid the pawnee from buying the thing

(w) Cotton L.J. in *Re Morris* (1886) 18 Q. B. Div. 222, 232.

(x) *Jones v. Marshall* (1889) 24 Q. B. D. 269, 271.

(y) Note to Law Journal report of *1890 v. Cubley* (1864) 15 C. B. N. S. 702, 33 I. C. P. 171, 136, 137 R. R. 725.

(z) *Carter v. Blake* (1877) 4 Ch. D. 603.

(a) *Mahalinga Nadar v. Chinapathi Subbier* (1902) 27 Mad. 628, *Nim Chandi v. Jayabundhu* (1894) 22 Cal. 21, *Jyoti Prakash v. Multa Prakash* (1917) 22 C. W. N. 297, 33 I. C. 891, *Debi Chandra v. Gaya Ierakal*, note (d) below.

pledged at the sale, though he cannot sell to himself. But it has been held by the Judicial Committee that a sale by the pawnee to himself, though unauthorised, does not put an end to the contract of pledge, so as to entitle the pawnor to have back the thing pledged without payment of the debt secured by it (b). From this point of view it would seem that a sale by a pawnee to himself is not an act "inconsistent with the conditions of the bailment" within the meaning of s 153 (p 525, above) so as to entitle the pawnor to avoid the contract of pledge at his option but is on the same footing as a premature sale (see the commentary on that section).

**Reasonable notice of sale**—It is not necessary that the notice under this section should state the date, time or place of the intended sale. A notice by the pledgee to the pawnor that unless the latter redeems the articles pledged within a fortnight, the pledgee will sell them is good notice, though the pledgee may not sell the goods until some days after the expiration of the fortnight (c).

**Limitation**—The period of limitation for a suit on the loan is that prescribed by the Limitation Act, Sched II, art 57, that is, three years from the date of the loan, whether the suit be to recover the original amount of the loan, or to recover the balance after sale of the thing pledged (d). And if the suit be in respect of a promise the period is three years from the breach of the promise under art 115 of the same Act. And where the suit is for the sale of the property pledged, the period of limitation is six years from the date of the pledge under s 120 of that Act (e).

**177.**—If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or

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(b) *Neckram v Bank of Bengal* (1891) 19 Cal 322 333, L R 19 I A 60

(c) *Kunj Behari Lal v Bhargava Commercial Bank* (1918) 40 All 522 45 I C 462. A pledgee entitled to sell is not bound to sell within any particular time. *Kesarimal v Gundobathula Surya narayanamurti* 114 I C 800. A I R 1928 Mad 1022

(d) *Sayid Ali Khan v Debi Prasad* (1901) 24 All 201. *Jellappa v Desayappa* (1906) 30 Bom 218. *Dowlat Ram v Jivan Mal* (1881) 1unj Rec no 116, *Debidin v Gaya Pershad* 104 I C 640. A I R 1927 Nag 346

(e) *Mahalinga Nadar v Ganapathi Subbien* (1902) 27 Mad 528 per Subrahmanya Ayyar and Benson JJ

performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them, but he must, in that case, pay, in addition, any expenses which have arisen from his default

This is supplemental to the foregoing section, and requires no further explanation

**Limitation** —The period for a suit against a pawnee to recover the thing pledged is thirty years from the date of the pawn See Limitation Act, Sch I, art 145

**178.**—Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the pawnee acts in good faith, and has not at the time of the pledge notice that the pawnor has not authority to pledge

*Pledge by mercantile agent*  
**Explanation** —In this section the expressions “mercantile agent” and “documents of title” shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930

This section is the counterpart of the second paragraph of s 27 of the Indian Sale of Goods Act, 1930, which relates to sales

**Original s 178** —S 108 of the Contract Act, now superseded by ss 27 30 of the Indian Sale of Goods Act, 1930, related to the sale of goods by a person other than the owner thereof The original s 178 of the Contract Act dealt with the pledge of goods by a person other than the owner thereof That section has been repealed and the subject matter of the section is now spread over the present s 178 and s 178A of the Contract Act and s 30 of the Indian Sale of Goods Act The present s 178 and s 178A were inserted by the Indian Contract (Amendment) Act, 1930 which came into force on the 1st July, 1930

Davies J dissented in King that art 57 applied on the ground that the right to proceed against the property pledged was

merely auxiliary to the right to proceed against the debtor personally

The original s 178 read as follows —

“A person who is in possession of any goods, or of any bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly

“Provided also that such goods or documents have not been obtained from the lawful owner or from any person in lawful custody of them, by means of an offence or fraud ”

**Indian Factors Acts** —The law in force in British India before 1872 was contained in the Indian Factors Act XIII of 1840 and XX of 1844, the first of which extended to British India the provisions of 4 Geo IV c 83, as amended by 6 Geo IV c 94, and the second those of 5 & 6 Vict c 39 The Indian Factors Acts were repealed by the Contract Act As to the old ss 108 and 178 the Judicial Committee said “Ss 108 and 178, though they very possibly extend, at least cover the same ground as the provisions of the Indian Act XX of 1844 ’ (f)

**Pledge by mercantile agent** —By s 2 of the Indian Sale of Goods Act, sub sec (9), “mercantile agent” means a mercantile agent having in the customary course of business as such agent authority either to deal goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods This definition has been taken from the English Factors Act 1889 s 1

Under the old s 178 any person ‘in possession’ of goods or the documents of title to goods may make a valid pledge of the goods or document subject to the conditions laid down in that section The language of that section was very wide and it appeared capable of giving effect to pledges made by persons who were in temporary possession of goods or documents of title without having either the real or apparent authority of mercantile agents and indeed without being agents of any kind The Courts endeavoured to keep the results within tolerable bounds by putting a strict construction on the word “possession,” but this was only a partial remedy By the present

section the statutory power to pledge goods or documents of title is confined to mercantile agents, being such as in the customary course of their business have authority to deal with goods. Other cases in which a person other than the owner of the goods may make a valid pledge are dealt with in s 178A below and in s 30 of the Indian Sale of Goods Act considered below. The result is that a valid pledge can no longer be made by any person "in possession" of goods. It can only be made by a mercantile agent as provided in s 178, or by a person who has obtained possession of the goods under a contract voidable under s 19 or s 19A of the Act as provided in s 178A, or by a seller or by a buyer in possession of goods after sale as provided in s 30 of the Indian Sale of Goods Act.

The word "possession" in the old s 178 was held to mean juridical possession. At the same time there were cases in which it was said that there was nothing in the language of the section to warrant such a limitation. Decisions under the old section may be divided into five groups according to the character of the pledgor's possession, namely —

- (1) Pledge by a commission agent employed to sell goods (g), or by a broker employed to sell goods onjangad terms (h)
- (2) Pledge by a seller who has been left in possession of the goods sold (i)
- (3) Pledge by a person in bare custody of goods, e g, by a servant (j), or by a wife (k), or by a hirer of goods (l) or by a gratuitous bailee (m)
- (4) Pledge by a person who has agreed to buy goods under a hire purchase agreement and who has not made default in payment of the instalments (n)

(g) *Seshappier v Subramania* (1916) 40 Mad 678, 34 I C 751. See also *Profulla Kumar Bose v Labo Kisore Das* (1918 19) 23 C W N 907. 54 I C 224. *King Fm perer v Agri Po Chit* (1923) 1 Rang 199. 74 I C 1000, A I R 1923 Rang 227.  
 (h) *Durgadas v Saraswati Das* (1922) 31 Bom L R 414. 118 I C 706.  
 (i) *Haji Jahimbux v Central Bank of India Ltd* (1925) 50 Cal 367. 119 I C 22.  
 (j) *Baldmeyer Daboe v Suraram* (1878)

4 Cal 497.  
 (k) *Seager v Hulma Kees* (1900) 24 Bom 458.  
 (l) *Vaginala v Rappu* (1903) 27 Ma 1 474.  
 (m) *Isaiah v C pti v Kamalammal* (1911) 47 Ma 1 173. 70 I C 418. A I R 1922 Ma 1 44.  
 (n) *Abdul Hassan Khan v Fingri Lal* (1902) Punj Lec no 34. But see *Leon Saubole v A J Seyne d Bros* (1916) 23 C W N 322; 50 I C 476.

(5) Pledge by a person entrusted with goods for a specific purpose (o)

(1) A commission agent or broker may make a valid pledge of the goods under the old as well as the present section

(2) A seller left in possession of goods may make a valid pledge under the old section as well as under s 30 of the Indian Sale of Goods Act

(3) A person in bare custody of goods may not make a valid pledge either under the old or the present section..

(4) A hirer under a hire purchase agreement who has entered into a binding agreement to buy goods may make a valid pledge under the old as well as the present section See notes below, "Seller or buyer in possession after sale"

(5) A person entrusted with goods for a specific purpose may not make a valid pledge either under the old or the present section

**Antecedent debt**—Under the English Factors Act of 1842 a pledge by an agent entrusted with the possession of goods to secure an "antecedent debt" did not come within the protection of the Act, and the same law was extended to this country by the Indian Factors Act XX of 1844 The present section seems to protect a pledge for an antecedent debt as well as a pledge for an advance made specifically upon it See English Factors Act, 1889, s 4

**Good faith**—To validate a pledge by a mercantile agent the pledgee must have acted in good faith and must not have at the time of the pledge notice that the pawnor had no authority to pledge the goods The onus of proving both these facts rests upon the person disputing the validity of the pledge Under s 3 cl 20 of the General Clauses Act, 1897, a thing is to be deemed done in good faith where it is in fact done honestly whether it is done negligently or not Gross negligence may be evidence of bad faith but it is not the same thing and does not entail the same consequence (p)

**Notice**—The term "notice" in this section includes both express and constructive notice

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| (o) <i>Ramasami Gupta v Kamalammal</i> (1921) 45 Mad 173, 70 I C 448, A I R 1922 Mad 44 | Indian Factors Act 1842 <i>Gobind Chunder Sein v Ryan</i> (1861) 9 M I A 140, 1 W R 43, P C, <i>Jonmenjoy v Watson</i> (1884) 10 Cal 910, L P 11 |
| (p) See <i>Jones v Gordon</i> (1877) 2 App Cas 616, at p 629 Cases under the            | I. A. 94   |

**Pledge by co-owner in possession** — One of several joint owners of goods in sole possession thereof with the consent of the rest may make a valid pledge of the goods (q) Compare Indian Sale of Goods Act, s 28

**Seller or buyer in possession after sale** — Besides the cases mentioned above there are two other cases in which a person who is not the owner of goods may make a valid pledge thereof, namely, a seller left in possession after sale, and a buyer to whom possession has been delivered before payment of the price. These cases have been provided for in s 30 of the Indian Sale of Goods Act, 1930, which is a reproduction of s 25 of the English Sale of Goods Act, 1893. S 30 of the Indian Sale of Goods Act is as follows —

“(1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale *pledge* or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same

“(2) Where a person having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale, *pledge* or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist ”

The above section provides not only for a sale by a buyer or seller in possession, but also for a pledge, mortgage or other disposition of goods. It was intended at one time to transfer so much of that section as relates to pledge to the present chapter, but it was not done as separate legislation codifying the law as to pledge, mortgage and hypothecation of goods is in contemplation

**Pledge by seller remaining in possession** — The following are illustrations of a pledge by a seller left in possession of the goods sold —

(a) B buys goods from A, pays for them, but leaves the goods in

(q) *Shah's Firm v. Mahesh Chand* (1885) 11 Ind. Rec. no 1

the possession of A. A then pledges the goods with C who has no notice of the sale to B. The pledge is valid.

- (b) A sells 100 cases of cutlery to B under an agreement made in July, 1927, that payment should be made within five months from the date of the agreement and delivery should be taken within that time, the goods remaining in the meanwhile in A's godown free of rent. In August, 1927, A pledges the goods with C who has no notice of the sale to B. The pledge to C is valid (r).

*Pledge by buyer obtaining possession*—Sect. 30 (2) of the Indian Sale of Goods Act validates a pledge not only by a person who has bought goods but also by one who has agreed to buy them. The hirer under a hire purchase agreement is not a person who has agreed to buy goods within the meaning of this section unless he is under a binding agreement to buy them. An option to buy will not suffice (s).

*Competition between prior mortgagee and subsequent pledgee*—A mortgages certain goods to B, the mortgage not being accompanied with possession (t). Afterwards A pledges the goods with C. The pledge to C is not invalid, and C has a priority over B (u).

*Documents of title to goods.*—By sec. 2, sub s. (4), of the Indian Sale of Goods Act, 1930, "documents of title to goods" includes a bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented. Share certificates are not documents of title to goods within the meaning of this section (v), nor cash receipts given in place of delivery orders (w).

(r) *Haji Rahimbux v Central Bank of India, Ltd* (1928) 56 Cal 367, 119 I C 23, a case under the old s. 178.

(s) *Belsue Motor Supply Co v Cox* (1914) 1 K B 244.

(t) A mortgage of movable property, although not accompanied by possession is valid in India. *Shrish Chandra Roy v Mungra Bewa* (1904) 9 C W N 14,

*Damodar v Atmaran* (1906) 8 Bom L R 344.

(u) *Chummun Khan v Vody* (1874) Punj Rec no 70.

(v) *Lalit Mohan v Harilas* (1916) 24 Cal L J 335, 37 I C 707.

(w) *Kemp v Falk* (1882) 7 App Cas 573, at p 585.

A. **Revocation of authority of mercantile agent.**—A pledge by a mercantile agent, though made after the revocation of his authority, is valid, provided the pledgee has not at the time of the pledge notice of such revocation (x)

**178A.**—When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title

Pledge by person in possession under voidable contract

This section is the counterpart of s 29 of the Indian Sale of Goods Act, 1930 That section is based on s 23 of the English Sale of Goods Act, 1893

**Pledge by person in possession under voidable contract** — A person may obtain possession of goods under a contract which is voidable at the option of the lawful owner on the ground of fraud, misrepresentation or coercion (s 19), or on the ground of undue influence (s 19A) Possession so obtained is not by free consent as defined in s 14 of the Act It is nevertheless possession by consent, and the person in possession may make a valid pledge of the goods provided the contract has not been rescinded at the time of the pledge There is in such a case a *de facto* contract, though voidable on the ground of fraud and the like It is, however, different if there is no real consent, as where goods have been obtained by means of theft as defined in s 378 of the Indian Penal Code A thief has no title and can give none

Where goods have been obtained by fraud the person who has so obtained may either have no title at all, or a voidable title, according to the nature of the transaction If the nature of the fraud is such that there never was a contract between the parties, the person who so obtains the goods has no title and can give none Thus if A represents to B that he is acting as agent for C, and B relying on that representation delivers goods to A as buyer, there is not a voidable contract between A and B, but no contract at all No property passes to A,

(x) See English Factors Act, 1852 s 2 (2) and *Moolj v Dhall* (1917) 33 Times L R 700

and he can neither make a valid sale (y) nor a valid pledge. This is really a case of a fundamental error as to the person with whom one is contracting. There is no real consent and no contract, there is only an offer on B's part to the person with whom alone he means to deal and thinks he is dealing: See note under s 13, p 88, above, "Error as to the person of the other party". But if a person buys goods with the intention of not paying for them, there is consent, though not free, and a contract, though voidable (z), and he may make a valid pledge or sale of the goods while the contract is still subsisting (a), though the fraud may amount to the offence of cheating, as defined in s 415 of the Indian Penal Code. This was not so under the old s 178. Under that section a person who obtained possession of goods "by means of an offence or fraud" could not make a valid pledge. Under the present section a person who obtains possession of the goods under a contract voidable under s 19 or s 19A may make a valid pledge though the transaction may amount to an offence or fraud.

**Good faith.**—See note under s 178

**Notice**—See note under s 178

**179.**—Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Pledge where pawnor has only a limited interest

This must be taken as subject to the operation of the foregoing section. In those cases where a pledge which otherwise would not be valid is made valid by s 178, it does not matter whether the pawnor has any interest of his own or not. The present section applies to other cases where the pawnor has possession and some interest, but not the whole interest, in the goods, and where it applies, it is immaterial that the pawnee had not notice of the pawnor's limited interest (b). Probably it does not apply to a case in which he is not entitled to possess the thing in his own right, but has obtained or been entrusted with possession for some special and limited purpose, and pledges the thing for his own purposes (c). In such a case the attempted pledge is,

(y) *Hardman v Booth* (1863) 32 L J 672, 705

Fr 105

(z) *Clough v Lond & A B Ry Co* (1871) L R 7 Ex 26

(b) Long settled law *Hoare v Parler* (1788) 2 T R 376, 1 R R 500

(c) *Byberg v Handelsaar* [1892] 2 Q B

202

(a) *Croft v Lumley* (1858) 6 H L C

failure to deliver the goods. And the result is the same if the goods are ordered out through a branch in this country of a firm of commission agents in another country (c). For the same reason, where a commission agent buys goods for a merchant at a price smaller than the limit specified in the indent, he cannot charge any price higher than that actually paid by him (d) except in the case of a custom to the contrary (e). See notes to s 211, below.

An agent may have, and often has in fact a large discretion but he is bound in law to follow the principal's instructions provided they do not involve anything unlawful. To this extent an agent may be considered as a superior kind of servant, and a servant who is entrusted with any dealing with third persons on his master's behalf is to that extent an agent. But a servant may be wholly without authority to do anything as an agent, and agency, in the case of partners even an extensive agency, may exist without any contract of hiring and service.

**Del credere agent** — A *del credere* agent is one who in consideration of extra remuneration, called a *del credere* commission undertakes that persons with whom he enters into contracts on the principal's behalf will be in a position to perform their duties (f). A *del credere* agency may be inferred from a course of dealing between the principal and agent showing that extra remuneration was charged for the risk of bad debts (g). A *del credere* agent incurs only a secondary liability towards the principal: he is in effect a surety for the persons with whom he deals to the extent of any default by insolvency or something equivalent, but not to the extent of a refusal to pay based on a substantial dispute as to the amount due (f).

(c) *Mahomedally v Schiller* (1889) 13 Bom 470. The order to the defendants in this case was in the following form:

I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below.

(d) *Shaw v Bai Nath* (1897) Punj Rec no 21.

(e) See *Jaul Bher v Chotalal Javerdas* (1906) 30 Bom 1 cited in notes to s 211 p 299 below.

(f) *Morris v Coadby* (1816) 4 M & S 66 16 J B 544. *Hornby v Lacy* (1817) 6 M & S 160 18 J B 1 315.

*Thomas Gabriel and Sons v Church and Sons* [1914] 3 K B 127. C A. In England this has not the effect of bringing his contract within the Statute of Frauds as it is essentially different from a guarantee. *Comptur v Hastie* (1856) 5 L J 40. 20 P 1 54. *Sutton v Grey* [1894] 1 Q B 255. As to the analogous position of a *pollia als a seep* see p 299. (30) *Champa Puri v Tulsi Ram* (1907) 20 All I J 81 103 I C 739. A 1 1 10. All 61. a variant spelling of a *pollia* see p 299.

(g) *Shaw v Woodcock* (1857) 7 B & C 33 31 B B 1 4.

It is sometimes difficult to decide whether a consignee of goods for sale is a *del credere* agent or buyer, where he is permitted to sell at such prices and on such terms as he thinks fit, and allowed to retain any profits over and above an agreed price, the payment of which he guarantees to the principal (h)

**Co-agents**—Two or more persons may be employed to act as agents jointly or severally, or jointly and severally. In the absence of circumstances indicating an intention to the contrary, an authority given to two or more persons is presumed to be given to them jointly and not severally, and in such case it is necessary that they should all concur in the execution of the authority in order to bind the principal (i), unless it is provided that a certain number of them shall form a quorum (j). There is, however, an exception to this rule where the authority conferred is of a public nature. In such a case, if all the persons in whom the authority is vested meet for the purpose of exercising it, the act of the majority is considered that of the whole body (k). Where authority is given to co-agents severally, or jointly and severally, any one or more of them may exercise it so as to bind the principal without the concurrence of the other or others (l).

**183.**—Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent

Who may employ agent

**184.**—As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained

Who may be agent

(h) Compare *Ex parte White In re Nevill* (1870) L R 6 Ch 397 with *Ex parte Bright In re Smith* (1879) 10 Ch Div 566. And see *Livingstone v Ross* [1901] A C 327.

(i) *Brown v Andrew* (1849) 18 L J Q B 153, 83 R R 842. *In re Liverpool Household Stores* (1890) 59 L J Ch 616.

(j) See *R dley v Plymouth Grind ng*

*Co* (1848) 2 Ex 711 76 R R 742. *Airk v Bell* (1851) 16 Q B 290 83 R R 456. *D Arcy v Tamar Rail Co* (1866) L R 2 Ex 158.

(k) *Grindley v Barker* (1798) 1 B & P 229 4 R R 787.

(l) *Guthrie v Armstrong* (1899) 6 B & Ald 628.

As between the principal and third persons, the act of an agent is looked upon as the act of the principal who authorised it. Hence the rule that a person who has no capacity, or only a limited capacity, to contract on his own behalf is competent to contract so as to bind his principal. In pursuance of this rule the fact of an agent being unable to read or write has been held to constitute no ground for the avoidance by the principal of a written contract made by the agent on his behalf (m).

Consideration  
not necessary      **185.**—No consideration is necessary to create an agency.

By the Common Law no consideration is required to give a man the authority of an agent, nor to make him liable to the principal for negligence in that which he has already set about, for such liability, though it may be defined by the terms of a contract, is in its nature independent of contract, but a merely gratuitous employment or authority does not bind the agent to do anything, and if, having neither reward nor promise of reward, he does nothing at all, the principal does not appear to have any remedy. But this distinction is of little practical importance, if any.

Agent's authority may be expressed or implied      **186.**—The authority of an agent may be expressed or implied

**Express authority.**—See particularly Registration Act III of 1877, s 32 (agent for registration), and Code of Civil Procedure, s 39 (Appointment of pleader) (n).

**187.**—An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case, and things spoken or written, or the ordinary course of dealing may be accounted circumstances of the case.

#### Illustration

A owns a shop in Scampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of

(m) *Foreman v Great Western Ry Co* (1878) 13 I T 851

(n) Cp Code of 1908, O 3, r 4

ordering goods from C in the name of A for the purposes of the shop and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

**Implied authority.**—It is needless to cite authorities to show that the ordinary course of affairs must be regarded in order to ascertain the extent of an authority not defined except by the general nature of the business to be done. "A person who employs a broker must be supposed to give him authority to act as other brokers do" (o). It might be difficult, but happily there is no need, to draw a clear line between cases falling under the latter part of this section and those falling under the second paragraph of s. 188. As to the saving of usages of trade under this Act, see on s. 1, p. 11, above.

A power of attorney authorising the holder "to dispose of" certain property in any way he thinks fit does not imply an authority to mortgage the property (p). Nor does a power of attorney to an agent to carry on the ordinary business of a mercantile firm imply an authority to draw or indorse bills and notes (q). Authority on dissolution of partnership to settle the partnership affairs does not authorise the drawing, accepting, or indorsing of bills of exchange in the name of the firm (r). Where the principal carries on a general money lending business, the authority to the agent to borrow implies an authority to pledge the principal's credit for the purpose of obtaining or securing advances from others to customers (s).

**Exclusive agency.**—Appointment of a "sole agent" does not preclude the principal from acting himself in the business of the agency without being accountable to the agent. Only an express prohibition would have that effect (ss).

**Husband and wife.**—This is a special and important case of implied authority. "The liability of a husband for a wife's debts depends on the principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has

(o) *Sutton v Tatham* (1839) 10 Ad. & E. 27, 50 R. R. 312 per Little Dale J.

(p) *Malukchand v Sham Moghan* (1890) 14 Bom. 590. *Bank of Bengal v Fagan* (1849) 5 M. I. A. 27, 41.

(q) *Pestonjys v Gool Mahomed* (1874) 7 M. H. C. 369. See Negotiable Instruments Act 1881 s. 27.

(r) *Abel v Sutton* (1800) 3 Esp. 108, 6 R. R. 818.

(s) *Bank of Bengal v Ramanathan* (1916) L. R. 43 I. A. 48, 54, 43 Cal. 527, 450, 32 I. C. 419.

(ss) *Bentall Horsley and Baldry v Barclay* [1931] 1 K. B. 253.

done" (t) "Thus a person dealing with a wife and seeking to charge her husband must show either that the wife is living with her husband and managing the household affairs, in which case an implied agency to buy necessaries is presumed (u), or he must show the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance, when, of course, the law would give her an implied authority to bind him for necessaries supplied to her during such separation in the event of his not providing her with maintenance" (v) Where a European husband and wife, therefore, lived together, it was held that the husband was not liable for moneys borrowed by the wife to pay her previous debts, and not for the purpose of any household or necessary expenses (u) Similarly, a European husband is not liable for the price of goods supplied to his wife, where the husband was remitting to her sums amply sufficient for her maintenance and had expressly forbidden his wife to pledge his credit, and, further, the wife kept a boarding school and was in receipt of payments made by the parents of children boarding with her (x) Much the same principles apply to Hindus A Hindu wife living separate from her husband because of his marriage with a second wife has no implied authority to borrow money for her support, as the second marriage does not justify separation (y) But when a woman governed by the provisions of the Married Women's Property Act III of 1874 has separate property of her own (z), the presumption would be that she was not pledging her husband's credit A European wife subject to the last mentioned Act carried on the business of a milliner, and the husband had no concern in it, it was held that he was not liable for debts contracted by the wife in the management of that business (a) But, whatever be the law to which the parties are subject, it is clear that there can be no presumption of agency where moneys are borrowed by a woman in her own right as heir to her husband under the belief that the husband is dead In such a case the lender must be taken to

(t) *Girdhari Lal v Crawford* (1885) 9 All 147 155

(u) Not conclusively *Debenham v Mellon* (1880) 6 App Ca 24

(v) *Israrams v Apparam* (1863) 1 M H C 375 The authority of necessity, where it exists is altogether independent of contract

(w) See note (t) above

(x) *Mahomed Sultan Sahib v Horace Robinson* (1907) 30 Mad 543

(y) See note (v) above See also *Atal kumar v Jaihar* (1870) 1 Bom 121, 122

(z) See notes on s 11, p 78 ante

(a) *Allumuddy v Braham* (1878) 4 Cal

have dealt with the woman in her own right, "and not looking in any way to the husband as responsible for the debt" (b)

It is now settled in England that "the question whether a wife has authority to pledge her husband's credit is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances" (c), such as the presumption from a man and his wife living together in the ordinary way "that he entrusts her with such authorities as are commonly and ordinarily given by husband and wife" (d), including authority to pledge his credit to a reasonable extent and in a reasonable manner for ordinary household expenses. Where such authority exists, it can be revoked, or its existence may be negatived by the husband supplying the wife with an adequate allowance of ready money (e). And a person with whom the wife deals is entitled to notice of her authority being revoked only if the husband has in some way, as by paying previous accounts, given him reason to believe that the wife's transactions were authorised (f).

**188.**—An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business

#### Illustrations

(a) A is employed by B residing in London to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same.

(b) A constitutes B his agent to carry on his business of a shipbuilder. B may purchase timber and other materials and hire workmen for the purpose of carrying on the business. [It has been held but contrary to English authority not cited that an agent having general authority to carry on the principal's business and receive and expend money therein has implied authority to borrow money so far as necessary for carrying on the business (g).]

(b) *Pusa v Mahadeo Prasad* (1880) 3 All 122

(c) *Debenham v Mellon* 6 App Ca at p 31 (Lord Selborne)

(d) *Ib* 6 App Ca at p 36 (Lord Blackburn)

(e) *Ib Morel Brothers & Co v Earl of Westmoreland* [1903] 1 K. B 64 C A

(f) *Debenham v Mellon* where earlier

authorities may be found collected and see the notes to *Manby v Scott* in 2 Sm L C., and 6 Encycl Laws of Engl 2nd ed 675-679. The later case of *Paquin v Beauclerk* [1906] A C 148, proceeds on the special construction of an English statute.

(g) *Dhanpat Fae v Allahabad Bank* (1906) 2 Luck 253, 8 I C 83, A I P

**Extent of authority.**—It is well settled that an agent's authority is, in Story's words (§ 58), "construed to include all the necessary and usual means of executing it." If its terms are ambiguous, the principal will be held bound by that sense in which the agent reasonably understood and acted upon them (*h*). Further, an authority is generally construed in case of doubt according to the usual course of dealing in the business to which it relates (*i*), partly because this may be presumed to have been really intended, and partly because third persons may reasonably attribute to an agent such authority as agents in the like business usually have. This last reason has been extended to holding an undisclosed principal liable for a purchase on credit which he had expressly forbidden the agent to make (*j*). As in the case of an undisclosed principal there can be no apparent authority, and in fact there was no real authority, the correctness of this decision is doubtful (*k*). It rather seems that the rule applies only where credit is given not to the agent alone, but to the principal or firm which he apparently represents (*l*).

The following are illustrations from the English authorities of the rule stated in the first paragraph of the section. An agent employed to get a bill discounted has authority to warrant it a good bill, but not to indorse it in the principal's name (*m*). If employed to find a pur-

1927 Oudh 44 *contra Hartlyne v Journe* see p 574 below

(*h*) *Ireland v Livingston* (1874) L R 5 H L 995

(*i*) *Fg, I le v Jeash* (1860) 25 B & S 562. But an agent entrusted with goods for sale by a person who does not trade in such goods has no implied authority to bind his principal by a warranty. *Proby v Todd* (1861) 9 C B N S 92, 127 R R 70.

(*j*) *Wattson v Fenwick* [1891] 1 Q B 46

(*k*) It is not approved by Lord Ind in *Partnership* 9th LL, 178 note and see 1 Q B 12111 *Parnelandra Sira v Aasem Adin* (1913) 25 C W N S 421, 51 I C 513, A I R 1925 Cal 29. Mr Pl v R Mechem in *Harv Law R* xxiii 601 admits that *Wattson v Fenwick* can clearly not be sustained upon the ordinary

principles of estoppel. But supports it on the ground of holding out or putting forward an ostensible principal. Put surely an ostensible principal is not put forward by any one. If there is no estoppel there can be no holding out. The case was followed on similar facts in *Kenahan & Co v Parry* [1910] 2 K B 989 (reversed on the facts without any decision in point of law, [1911] 1 K B 409) but only as limiting on a court of coordinate jurisdiction, and it is still doubtful whether it will ultimately be supported as of general application. The trade then in question has many peculiarities in England.

(*l*) This condition was satisfied in *Thomson v Puchell* (1867) 1 R 1 Q B 97, which *Wattson v Fenwick* professed to follow.

(*m*) *Fenn v Harrison* (1701) 1 T R 77.

chaser for property, he has authority to describe the property, and state any circumstances which may affect its value, to a proposed purchaser (n) Authority to sell a horse implies authority to warrant it, if the principal is a horse dealer (o), or the sale is at a fair or public market (p), but not if the principal is unaccustomed to dealing in horses and the sale is a private one (q)

Where an agent is authorised to receive payment of money on his principal's behalf, the payment, in order to bind the principal, must be in cash (r), unless it can be shown that, by a reasonable custom or usage of the particular business in which the agent is employed, payment may be made in some other form, as, for instance, by cheque (s) or bill of exchange (t) A custom for an agent to receive payment by way of set-off or settlement of accounts between himself and the person making the payment is regarded as unreasonable, and is not binding on the principal unless he was aware of it and agreed to be bound by it at the time when he authorised the agent to receive payment (u)

**Construction of powers of attorney**—A power of attorney is a formal instrument (generally executed under seal in England, but not in India outside the Presidency towns) by which authority is conferred on an agent Such an instrument is construed strictly, and confers only such authority as is given expressly or by necessary implication (v)

(n) *Mullens v Miller* (1882) 22 Ch D 194

(o) *Howard v Sheward* (1866) L R 2 C P 148

(p) *Brooks v Hassall* (1883) 49 L T 569

(q) *Brady v Todd* (1861) 9 C B N S 592, 127 R R 797

(r) *Pape v Westcott* [1894] 1 Q B 272 *Blumberg v Life Interests, etc, Corporation* [1898] 1 Ch 27 *Hine v S S Ins Syndicate* (1895) 72 L T 79 (policy broker has no authority to take bill of exchange in payment)

(s) *Bridges v Garrett* (1870) L R 5 C P 451

(t) *Williams v Evans* (1866) L R 1 Q B 352 (auctioneer no authority to take bill of exchange in payment of deposit)

(u) *Underwood v Nicholls* (1855) 17 C B 239 *Pearson v Scott* (1878) 9 Ch

Div 198 *Sueeling v Pearce* (1859) 7 C B N S 449 121 R R 584 (custom for policy brokers to receive payment from underwriters by way of set off)

(v) *Bryant v La Banque du Peuple* [1893] A C 170 *Jonmenjoy Coondoo v Watson* (1884) 9 App Ca 561 (a power from time to time to negotiate make sale dispose of assign and transfer gives no authority to pledge) *Cp Bank of Bengal v Macleod* (1849) 5 M I A 1, 83 R R 1 *Bank of Bengal v Fagan* (1849) 5 M I A 27, 83 R R 15 (a power to sell indorse and assign does authorise an indorsement to a bank as security for a loan)

One of the most important rules for the construction of a power of attorney is that regard must be had to the recitals which, as showing the scope and object of the power, will control all general terms in the operative part of the instrument. Thus, where it was recited that the principal was going abroad, and the operative part gave authority in general terms, it was held that the authority continued only during the principal's absence (w).

Another rule is that where special powers are followed by general words, the general words are to be construed as limited to what is necessary for the proper exercise of the special powers, and as enlarging those powers only when necessary for the carrying out of the purposes for which the authority is given (x). There are many reported cases illustrating this rule, of which the following are examples. A power of attorney was given by a principal, who carried on business in Australia, to purchase goods either for cash or on credit in connection with the business, and when necessary in connection with any such purchases, or with the business, to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper, and it was held that the power gave no authority to borrow money, and the principal was therefore not liable in bills of exchange given in respect of a loan (y). Where power was given to demand and receive all moneys due to the principal on any account whatsoever, to use all means for the recovery thereof, to appoint attorneys to bring actions, and revoke such appointments, and to do all other business, it was held that the words "all other business" must be construed to mean all other business necessary for the recovery of the moneys, and that the agent had no authority to indorse a bill received by him in pursuance of the power (z). Where an executor gave a power of attorney to transact in his name all the affairs of the testator, it was held that the agent had no authority to accept a bill of exchange in the name of the executor so as to bind him personally (a).

(w) *Danby v Collins* (1883) 29 Ch Div 500.

(x) *Attwood v Munnings* (1827) 7 B & C 275, 31 P R 194; *Harper v Godsell* (1870) L R 5 Q R 422; *Eryart v La Banque du Peuple* [1893] 1 C 170.

(y) *Jacob v Morris* [1902] 1 Ch 516.

(z) *Hejtz v Smith* (1860) 1 Taunt 347.

9 R R 788. Similar cases: *Fedale v La Vauze* (1830) 1 A C 794, 41 R R

209; *Hay v Goldsmith* (1804) 1 Taunt 349, 9 R R 790; *Murray v East India Co* (1821) 5 B & Ald 204, 24 R R 300.

(a) *Cardner v Basille* (1796) 6 T 1001, 3 R R 531, 535.

A power of attorney is, however, construed as including all incidental powers necessary for carrying out its object effectively (b) A power to commence and carry on all actions, suits, and other proceedings, touching anything in which the principal might be in anywise concerned was held to authorise the signature by the agent on behalf of the principal of a bankruptcy petition against a debtor of the principal (c) See Powers of Attorneys Act, VII of 1882.

**Authority to do every lawful thing necessary for the purpose.**—The authority conferred by this section to do things necessary for a business may be excluded either expressly or impliedly by the terms of the agency Thus where A appointed B manager of his silk factory, and executed to him a power of attorney specifying his powers and authority but the document gave no authority to B to borrow, it was held that A was not liable for money borrowed by B as manager and attorney of A. “Sections 187 and 188 would no doubt authorise a manager to borrow if necessary, but such general provisions are subject to modifications in particular cases, and in this case they were so modified, for the manager had been allowed no power to borrow” (d)

**Authority of counsel, attorney, and pleader.**—Though the relation between a client and an attorney or pleader is that of principal and agent, it is not so in the case of counsel (e) Nevertheless counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, without need of further authority, full power to compromise a case on behalf of his client “Counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the opposite party” (f) But this authority does not extend to a compromise of matters outside the scope of the particular case in which

(b) *Howard v Baillie* (1796) 2 H Bl 618, 3 R R 531, *Willis v Palmer* (1859) 7 C B N S 340, 121 R R 522, *Routh v Macmillan* (1863) 2 H & C 750, 133 R R 778, *Ex parte Frampton* (1859) 1 D F & J 263, 125 R R 443

(c) *In re Wallace* (1884) 14 Q B Div 22

(d) *Ferguson v Um Chand Boid* (1905) 33 Cal 343

(e) Per Lord Esher M R in *Matthews v Munster* (1887) 20 Q B Div 141, 142

(f) *Bowen L J*, 20 Q B Div at p 144 *Jang Bahadur v Shankar Rai* (1890) 13 All 272, *Nundo Lal v Nistarin* (1900) 27 Cal 428, *Jagannathdas v Ramdas* (1870) 7 B H C O C 79 See *Carrison v Rodrigues* (1886) 13 Cal 115, where the Court set aside a compromise made by counsel for the plaintiff against her express prohibition, the consent decree not having been sealed, and the plaintiff having notified her dissent before the decree was drawn up

he is retained (*g*), nor to referring the case itself to arbitration on terms different from those which the client has authorised (*h*) According to the Calcutta High Court, the general authority of counsel (whether barrister or advocate) extends in India only to compromises in Court (*i*) The whole subject has more lately been reviewed by the Judicial Committee without mention of this distinction (*j*) An attorney is entitled in the exercise of his discretion to enter into a compromise, if he does so in a reasonable, skilful, and *bona fide* manner, provided that his client has given him no express directions to the contrary (*k*) In the only Indian case on the subject, the Court found that the client had authorised his attorney to compromise, and that the compromise was reasonable and proper (*l*) The case of a pleader stands on a different footing, and he cannot enter into a compromise on behalf of his client without his express authority (*m*)

**Authority of factor.**—A factor to whom goods are entrusted for sale has authority to sell them in his own name (*n*), on reasonable credit (*o*), at such times and at such prices as in his discretion he thinks best (*p*), to receive payment of the price where he sells them in his own name (*q*), and to warrant the goods sold, if in the ordinary course of business it is usual to warrant that particular kind of goods (*r*) But he has no implied authority to barter the goods (*s*), nor to delegate his authority, even if acting under a *del credere* commission (*t*)

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|---|---|
| ( <i>g</i> ) <i>Nundo Lal v Nistarini</i> (1900) 27 Cal 428, <i>Johurmull Bhutra v Kedar Nath Bhutra</i> (1927) 55 Cal 113, 104 I C 387, A I R 1927 Cal 714                 | 7 B H C O C 79  |
| ( <i>h</i> ) <i>Neale v Gordon Lennox</i> [1902] A C 465, <i>Chuni Lal Mandal v Hira Lal Mandal</i> (1927) 32 C W N 44, 106 I C 309   | ( <i>m</i> ) <i>Jagapati v Ekambara</i> (1897) 21 Mad 274   |
| ( <i>i</i> ) <i>Askaran Choutmal v L I A Co</i> (1925) 52 Cal 386, 88 I C 413, A I R 1925 Cal 696   | ( <i>n</i> ) <i>Baring v Corrie</i> (1818) 2 B & Ald 137, 20 R R 383, <i>Ex parte Dixon</i> (1876) 4 Ch Div 133 |
| ( <i>j</i> ) <i>Sourendra Nath Mitra v Tarubala Dadi</i> (1930) 57 I A 133  | ( <i>o</i> ) <i>Houghton v Matthews</i> (1803) 3 B & P 485, 7 R R 815   |
| ( <i>k</i> ) <i>Fraj v Poules</i> (1859) 1 E & E 839 117 R R 483, <i>Prestwich v Poley</i> (1865) 18 C B N S 806, 144 R R 683 (authority of a managing clerk to compromise) | ( <i>p</i> ) <i>Smart v Sandars</i> (1816) 3 C L 390 71 R R 384   |
| ( <i>l</i> ) <i>Jagannathdas v Ramdas</i> (1870)  | ( <i>q</i> ) <i>Drinkwater v Goodwin</i> (1775) Lomp 251  |
|   | ( <i>r</i> ) <i>Dingle v Hare</i> (1859) 7 C B & S 145 121 R R 421  |
|   | ( <i>s</i> ) <i>Guerreiro v Peile</i> (1820) 3 B & Ald 616, 22 R R 500  |
|   | ( <i>t</i> ) <i>Cockran v Irlam</i> (1813) 2 M & S 301, 15 R R 257  |

**Authority of broker.**—A broker authorised to sell goods has implied authority to sell on reasonable credit (*u*), to receive payment of the price if he does not disclose his principal (*v*), and to act on the usages and regulations of the market in which he deals, except so far as such usages or regulations are unlawful or unreasonable (*w*). A usage which, by converting the broker into a principal, changes the intrinsic nature of the contract of agency is regarded as unreasonable (*x*). He has no implied authority to cancel (*y*), or vary (*z*) contracts made by him, nor to receive payment of the price of goods sold on behalf of a disclosed principal (*a*), nor, even when the principal is undisclosed, has he implied authority to receive payment otherwise than in accordance with the terms of the contract of sale (*b*). A broker has no implied power to delegate his authority even if acting under a *del credere* commission (*c*).

A policy broker authorised to subscribe policies on behalf of an underwriter has implied authority to adjust a loss arising under a policy (*d*) and to refer a dispute about such a loss to arbitration (*e*). But he has no implied authority to pay total or partial losses on behalf of the underwriter (*f*). Nor has a policy broker implied authority to cancel contracts made by him (*g*), or to receive payment from underwriters of a sum due under a policy by bill of exchange (*h*) or by way of set-off, even if there is a custom by which a set off is considered equivalent to payment as between brokers and underwriters, unless the principal had notice of the custom and agreed to be bound by it at the time when he authorised the broker to receive payment (*i*).

(*u*) *Boorman v Brown* (1842) 3 Q B 511 61 R R 287

(*v*) *Campbell v Hassel* (1816) 1 Stark 233

(*w*) *Cropper v Cook* (1868) L R 3 C P 194 *Robinson v Mollett* (1874) L R 7 H L 802 *Sutton v Tatham* (1839) 10 A & E 27, 50 R R 312

(*x*) *Robinson v Mollett* (1874) L R 7 H L 802

(*y*) *Xenos v Wickham* (1866) L R 2 H L 296

(*z*) *Blackburn v Scholes* (1810) 2 Camp 343, 11 R R 723

(*a*) *Lynch v Jameson* (1886) 2 T L R 206

(*b*) *Catterall v Hindle* (1867) 1 R 2 C P 368

(*c*) *Cockran v Irlam* (1813) 2 M & S 301 15 R R 257 *Henderson v Barne well* (1827) 1 Y & J 387 30 R R 793

(*d*) *Richardson v Anderson* (1805) 1 Camp 43 n 10 R R 678 n

(*e*) *Goodson v Brooke* (1815) 4 Camp 163

(*f*) *Bell v Auldjo* (1784) 4 Doug 48

(*g*) *Xenos v Wickham* note (*y*)

(*h*) *Hine v S S Insurance Syndicate* (1895) 72 L T 79

(*i*) *Sweeting v Pearce* (1859) 7 C B N S 449, 121 R R 584 *Bartlett v Pentland* (1830) 10 B & C 760 34

1. The first of these is the fact that the  
 library is not a mere collection of books  
 but a living organism which grows and  
 changes with the times. It is a place  
 where the mind is fed and the soul is  
 comforted. It is a place where the  
 past is made present and the future is  
 made possible. It is a place where  
 the light of knowledge is kindled and  
 the fire of hope is kindled. It is a  
 place where the heart is warmed and the  
 hand is strengthened. It is a place  
 where the spirit is lifted and the soul is  
 saved. It is a place where the  
 world is made new and the future is  
 made bright. It is a place where the  
 light of truth is kindled and the fire  
 of love is kindled. It is a place  
 where the heart is warmed and the hand  
 is strengthened. It is a place where  
 the spirit is lifted and the soul is  
 saved. It is a place where the world  
 is made new and the future is made  
 bright. It is a place where the light  
 of truth is kindled and the fire of love  
 is kindled. It is a place where the  
 heart is warmed and the hand is  
 strengthened. It is a place where the  
 spirit is lifted and the soul is saved.

2. The second of these is the fact that  
 the library is not a mere collection of  
 books but a living organism which grows  
 and changes with the times. It is a  
 place where the mind is fed and the  
 soul is comforted. It is a place where  
 the past is made present and the future  
 is made possible. It is a place where  
 the light of knowledge is kindled and  
 the fire of hope is kindled. It is a  
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**Authority of broker.**—A broker authorised to sell goods has implied authority to sell on reasonable credit (*u*), to receive payment of the price if he does not disclose his principal (*v*), and to act on the usages and regulations of the market in which he deals, except so far as such usages or regulations are unlawful or unreasonable (*w*). A usage which, by converting the broker into a principal, changes the intrinsic nature of the contract of agency is regarded as unreasonable (*x*). He has no implied authority to cancel (*y*), or vary (*z*) contracts made by him, nor to receive payment of the price of goods sold on behalf of a disclosed principal (*a*), nor, even when the principal is undisclosed, has he implied authority to receive payment otherwise than in accordance with the terms of the contract of sale (*b*). A broker has no implied power to delegate his authority even if acting under a *del credere* commission (*c*).

A policy broker authorised to subscribe policies on behalf of an underwriter has implied authority to adjust a loss arising under a policy (*d*) and to refer a dispute about such a loss to arbitration (*e*). But he has no implied authority to pay total or partial losses on behalf of the underwriter (*f*). Nor has a policy broker implied authority to cancel contracts made by him (*g*), or to receive payment from underwriters of a sum due under a policy by bill of exchange (*h*), or by way of set-off, even if there is a custom by which a set off is considered equivalent to payment as between brokers and underwriters, unless the principal had notice of the custom and agreed to be bound by it at the time when he authorised the broker to receive payment (*i*).

(*u*) *Boorman v Brown* (1842) 3 Q B 511, 61 R R 287

(*v*) *Campbell v Hassel* (1816) 1 Stark 233

(*w*) *Cropper v Cook* (1868) L R 3 C P 194, *Pobinson v Mollett* (1874) L R 7 H L 802, *Sutton v Tatham* (1839) 10 A & E 27, 50 R R 312

(*x*) *Pobinson v Mollett* (1874) L R 7 H L 802

(*y*) *Xenos v Wichham* (1866) L R 2 H L 296

(*z*) *Blackburn v Scholes* (1810) 2 Camp 343, 11 R R 723

(*a*) *Linck v Jameson* (1886) 2 T L R 206

(*b*) *Catterall v Hindle* (1867) 1 P 2 C P 368

(*c*) *Cockran v Irlam* (1813) 2 M & S 301, 15 R R 257, *Henderson v Barne well* (1827) 1 Y & J 397, 30 L R 799

(*d*) *Richardson v Anderson* (1800) 1 Camp 43 n, 10 L R 625 n

(*e*) *Goodson v Broole* (1815) 4 Camp 163

(*f*) *Bell v Auldjo* (1784) 4 Dougl 45

(*g*) *Xenos v Wichham* note (*y*)

(*h*) *Hine v S.S. Insurance Syndicate* (1895) 72 L T 79

(*i*) *Sweeting v Pearce* (1809) 7 C B N S 449, 121 R R 554, *Larlet v Penward* (1830) 10 B & C 760, 34

he is retained (g), nor to referring the case itself to arbitration on terms different from those which the client has authorised (h) According to the Calcutta High Court, the general authority of counsel (whether barrister or advocate) extends in India only to compromises in Court (i) The whole subject has more lately been reviewed by the Judicial Committee without mention of this distinction (j) An attorney is entitled in the exercise of his discretion to enter into a compromise, if he does so in a reasonable, skilful, and *bona fide* manner, provided that his client has given him no express directions to the contrary (k) In the only Indian case on the subject, the Court found that the client had authorised his attorney to compromise, and that the compromise was reasonable and proper (l) The case of a pleader stands on a different footing, and he cannot enter into a compromise on behalf of his client without his express authority (m)

**Authority of factor.**—A factor to whom goods are entrusted for sale has authority to sell them in his own name (n), on reasonable credit (o), at such times and at such prices as in his discretion he thinks best (p), to receive payment of the price where he sells them in his own name (q), and to warrant the goods sold, if in the ordinary course of business it is usual to warrant that particular kind of goods (r) But he has no implied authority to barter the goods (s), nor to delegate his authority, even if acting under a *del credere* commission (t)

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|--|--|
| (g) <i>Aundo Lal v Nistarini</i> (1900) 27 Cal 428, <i>Johurmull Bhutra v. Kedar Nath Bhutra</i> (1927) 55 Cal 113, 104 I C 387, A I R 1927 Cal 714              | 7 B H C O C 79   |
| (h) <i>Neale v Gordon Lennox</i> [1902] A C 465, <i>Chuni Lal Mandal v Hira Lal Mandal</i> (1927) 32 C W N 44, 106 I C 309                                       | (m) <i>Jagapati v Elambara</i> (1897) 21 Mad 274   |
| (i) <i>Askaran Choutmal v E I R Co</i> (1925) 52 Cal 386, 88 I C 413, A I R 1925 Cal 696   | (n) <i>Baring v Corrie</i> (1818) 2 B & Ald 137, 20 R R 383, <i>Ex parte Dixon</i> (1876) 4 Ch Div 133 |
| (j) <i>Sourendra Nath Mitra v Tarubala Datta</i> (1930) 57 I A 133   | (o) <i>Houghton v Matthews</i> (1801) 3 B & P 485, 7 R R 815   |
| (k) <i>Fray v Loules</i> (1859) 1 L & J 830 117 R R 483, <i>Irestuch v Pole</i> (1865) 18 C B N S 806, 141 R R 683 (authority of a managing clerk to compromise) | (p) <i>Smart v Sanders</i> (1846) 3 C L 380 71 R R 384   |
| (l) <i>Jagannathdas v Ramdas</i> (1870)  | (q) <i>Drinkwater v Coolum</i> (1775) Comp 251   |
|  | (r) <i>Dingle v Hare</i> (1859) 7 C B N S 145 121 R R 424  |
|  | (s) <i>Gierresiro v Icale</i> (1820) 3 B & Ald 616, 22 P R 500   |
|  | (t) <i>Cockran v Irlam</i> (1813) 2 M & S 301, 15 R R 257  |

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(*u*) *Boorman v Brown* (1842) 3 Q B 511, 61 R R 287

(*v*) *Campbell v Hassel* (1816) 1 Stark 233

(*w*) *Cropper v Cook* (1868) L R 3 C P 194, *Pobinson v Mollett* (1874) L R 7 H L 80 *Sutton v Tatham* (1839) 10 A & E 27, 50 R R 312

(*x*) *Robinson v Mollett* (1874) L R 7 H L 802

(*y*) *Xenos v Wislham* (1866) L R 2 H L 296

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(*e*) *Goodson v Brooke* (1815) 4 Camp 163

(*f*) *Bell v Auldjo* (1784) 4 Doug 48

(*g*) *Xenos v Wislham* note (*y*)

(*h*) *Hine v SS Insurance Syndicate* (1890) 72 L T 79

(*i*) *Sweeting v Pearce* (1859) 7 C B 549, 121 R R 584 *Bartlett v Pentland* (1830) 10 B & C 760, 34

The master of a British ship has also implied authority to give bottomry bonds, hypothecating ship, freight, and cargo, for necessary supplies or repairs in order to prosecute the voyage, when it is not possible to obtain them on personal credit, and communication with the respective owners is impracticable (*h*) The cargo alone may be hypothecated (*respondentia*) if necessary for the benefit of the cargo, or for the prosecution of the voyage, but the owners must in all cases be first communicated with if possible (*i*)

In the case of absolute or urgent necessity, as where in consequence of damage it is impossible to continue the voyage, and the ship cannot be repaired except at such a cost as no prudent owner would incur, the master has implied authority to sell the ship (*j*) But to justify a sale, the necessity must be such as to leave no other alternative, and communication with the owners must be impracticable (*k*) Where repairs are absolutely necessary in order to prosecute the voyage, and communication with the owners of the cargo is impracticable, the master has implied authority to sell a portion of the cargo to enable him to continue the voyage (*l*) But his authority as agent of the owners of the cargo is strictly one of necessity (*m*), and he is not justified in selling any portion thereof until he has done everything in his power to carry it to its destination (*m*) In no case has he implied authority to stop the voyage and sell the whole of the cargo in a foreign port, even if a continuation of the voyage is impossible, and to sell appears the best course to take in the owners' interest under the circumstances (*n*)

A shipmaster has implied authority to enter into contracts for the

(*h*) *Kleinwort v Cassa Marittima Genoa* (1877) 2 App Cas 156, *The Staffordshire* (1872) L R 4 P C 194, *Hussey v Christie* (1807) 13 Ves 599, R R 585, *Stainbank v Shephard* (1853) 13 C B 418, 93 R R 599

(*i*) *The Sullan* (1859) Swa 504, *The Onward* (1873) L R 4 Ad 38, *The Hamburg* (1863) 2 Moo P C (N S) 289, 41 R R 77

(*j*) *The Australia* (1859) 13 Moo P C 132, *Robertson v Clarke* (1824) 1 Bing 445, 25 P R 676, *Ireland v Thomson* (1817) 4 C B 149, 72 R R 560

(*k*) *Cobequid Marine Insurance Co v Bartheaux* (1875) L R 6 P C 119, *The*

*Bonita* (1861) 30 L J Ad 145

(*l*) *Australas an Steam Navigation Co v Morse* (1872) L R 4 P C 222, *Benson v Duncan* (1849) 3 Lx 644 77 I 1 776

(*m*) *Gibbs v Grey* (1857) 2 H & N 22, 115 R R 408, *Freeman v East India Co* (1822) 5 B & Ald 617, 21 R 1 497

(*n*) *Atlantic Mutual Insurance Co v Huth* (1879) 16 Ch D 474, *Wilson v Millar* (1816) 2 Stark 1, 19 R R 670, *Acalos v Burns* (1878) 3 Lx Div 282, *Van Omeron v Downick* (1809) 2 Cimp 42, 11 R R 650

carriage of merchandise according to the usual employment of the ship (*o*), and to enter into a charter-party on behalf of the owners if he is in a foreign port, and there is difficulty in communicating with them (*p*) But he has no implied authority to vary any contract made by the owners (*q*), or to agree for the substitution of another voyage in place of that agreed upon between the owners and freighters, or to make any contracts outside the scope of the voyage (*r*) His authority to sign bills of lading is limited to signing for goods actually received on board (*s*), and he has no authority to sign at a lower freight than the owners contracted for (*t*), or making the freight payable to any other persons than the owners (*u*)

**189.**—An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances

Agent's authority in an emergency

*Illustrations*

(a) An agent for sale may have goods repaired if it be necessary

(b) A consigns provisions to B at Calcutta with directions to send them immediately to C at Cuttack B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling

Illustration (b) seems to be suggested by Story's opinion that, "if goods are perishable and perishing the agent may deviate from his instructions as to the time or price at which they are to be sold"

§ A § 193 Under this head comes the authority already referred to (*v*) by which the master of a ship may sell the goods of an absent

(o) *Grant v Norway* (1851) 10 C B 605, 84 R R 747, *McLean v Fleming* (1871) L R 2 H L Sc 128

(p) *The Fanny* (1883) 5 Asp M C 75 *Grant v Norway*, last note

(q) *Pearson v Goschen* (1864) 17 C B N S 352, 142 R R 390

(r) *Burton v Sharpe* (1810) 2 Camp 529, 11 R R 788

(s) *Cox v Bruce* (1886) 18 Q B Div 147, *Hubbersty v Ward* (1853) 8 Ex 330, 91 R R 519 The master's signature is *prima facie* evidence against the owners that the goods signed for were put

on board but it is not conclusive against them *Broten v Poirer Duffryn Coal Co* (1875) L R 10 C P 562, *Smith v Bedouin Steam Navigation Co* [1896] A C 70, unless there is an agreement that the bill of lading shall be conclusive evidence against the owners as to the quantity shipped *Lishman v Christie* (1887) 19 Q B Div 333

(t) *Pickernell v Jauberry* (1862) 3 F & F 217, 130 R R 834

(u) *Peynolds v Jex* (1865) 7 B & S 66, 147 R R 351

(r) P 570, above

owner in case of necessity when he is unable to communicate with the owner and obtain his directions (w) But the manager of a business which does not include borrowing money as part of its ordinary course has no implied authority to borrow money on his principal's credit to carry on the business, even if the money is urgently needed (x) When however it is said "that the authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent" (x), it seems that this goes too far (y)

### *Sub-Agents.*

**190.**—An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub agent must, be employed.

For a similar rule in the case of trustees, see Trusts Act II of 1882, s 47

"One who has a bare power or authority from another to do an act must execute it himself and cannot delegate his authority to another" S A § 13 Thus in England the auctioneer at a sale by auction "is the agent of the purchaser as well as of the seller, and has authority to sign a memorandum of the sale so as to bind both parties", but he cannot of his own motion delegate that authority to his clerk (z) The reason that no such power can be implied as an ordinary incident in the contract of agency is that confidence in the particular person employed is at the root of the contract Accordingly,

(w) *Australasian Steam Navigation Co v Morse* (1872) L R 4 P C 222 Whether there is such urgent necessity as to give no time or opportunity for communicating with the owner is a question of fact *Acatos v Burns* (1873) 3 L R Div 252

(x) *Hawtayne v Bourne* (1841) 7 M & W 595, 600, 50 R R 806 810, apparently overlooked in *Dhanpat Rae v Allahabad Bank*, p 563, above, followed

*Re Cunningham & Co* (1887) 36 Ch D 532

(y) *Prager v Blatspiel* [1924] 1 K B 560, where the agent who sold goods as of necessity could not communicate with the principal, but the other requisite conditions of actual commercial necessity and good faith on the agent's part were not established

(z) *Bell v Ballis* [1897] 1 Ch 603, 609

auctioneers (a), factors (b), directors of companies (c), brokers (d), and other agents in whom confidence is reposed have, generally speaking, no power to delegate their authority "But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed" And "an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may be reasonably presumed that the parties to the contract originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute" (e) So it is "where a shipowner employs an agent for the purpose of effectuating a sale of a ship at any port where the ship may from time to time in the course of its employment under charter happen to be" (e), for it is obvious that the agent cannot himself be prepared to do the business at every such port Authority to delegate is implied whenever the act to be done by the sub agent is purely ministerial, and does not involve the exercise of any discretion (f)

In some cases the custom of trade justifies the delegation of special branches of work Thus it has been found to be a usage of trade for architects and builders to have the quantities taken out from their designs by surveyors, who are more expert in that work for the purpose of enabling proper estimates to be made, and the surveyor can sue the architect's employer for his charges (g)

**191.**—A "sub agent" is a person employed by, and acting under the control of, the original agent in the business of the agency

The relation of the sub agent to the original agent is, as between themselves, that of agent to principal "It may be generally stated

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|---|---|
| (a) <i>Coles v Trecothick</i> (1804) 9 Ves 234 7 R R 167  | (e) <i>De Bussche v Alt</i> (1878) 8 Ch Div 286 310 311           |
| (b) <i>Cockran v Irlam</i> (1813) 2 M & S 301, 15 R R 257 | (f) <i>Ex parte Birmingham Banking Co</i> (1868) L R 3 Ch 461     |
| (c) <i>In re Leeds Banking Co</i> (1880) L R 1 Ch 561     | (g) <i>Moon v Whitney Union</i> (1837) 3 Bing N C 814, 43 R R 802 |
| (d) <i>Henderson v Barnevell</i> (1827) 1                 |   |

that, where agents employ sub agents in the business of the agency, the latter are clothed with precisely the same rights, and incur precisely the same obligations, and are bound to the same duties, in regard to their immediate employers, as if they were the sole and real principals " S A § 386 In the three next following sections the Act has defined, in accordance with settled law, the relations of the ultimate principal to the sub agent in different cases

192.—Where a sub agent is properly appointed, the

Representation  
of principal by  
sub agent properly  
appointed

principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an

agent originally appointed by the principal

Agent's respon-  
sibility for sub  
agent

The agent is responsible to the principal for the acts of the sub-agent

Sub agent's re-  
sponsibility

The sub agent is responsible for his acts to the agent, but not to the principal, except

in case of fraud or wilful wrong

**Principal and sub-agent** —Where authority to appoint a sub agent in the nature of a substitute for the first agent "exists" either by agreement or as implied in the nature of the business "and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself" (h) This is the class of cases contemplated in s 191 Otherwise the sub agent looks to and is controlled by the agent who appointed him, and is not under any contract with the principal If money due to A is paid to P, who is Z's servant, Z having authority from A to collect it, P is accountable only to Z, and A cannot recover the money direct from P (i) But a sub agent is accountable to the principal for a secret commission improperly received by him (j)

And a sub agent who does not know that his employer is an agent is entitled to the same rights as any other contracting party dealing

(h) *De Bussche v Alt* (1878) 8 Ch Div 414, 37 R R 414

(j) *Powell v Jones* [1905] 1 K B 11.

(i) *Stephens v Balcock* (1872) 3 B & C 4

with an undisclosed principal (see ss 231, 232, p 616 below) "If A employs B as his agent to make any contract for him, or to receive money for him, and B makes a contract with C, or employs C as his agent, if B is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by C to be acting as an agent for any one, A cannot make a demand against C without the latter being entitled to stand in the same position as if B had in fact been a principal. If A has allowed his agent B to appear in the character of a principal he must take the consequences" (l)

Accordingly where goods consigned have been sold in good faith by a sub agent appointed by the consignee, and the proceeds have been brought into account between the consignee and the sub agent, the latter is not liable to account to the consignor. His account with the consignee cannot be interfered with by the consignee's principal except on the ground of bad faith (l)

**Agent's responsibility for sub-agent** — A commission agent for the sale of goods, who properly employs a sub agent for selling his principal's goods, is liable to the principal for the sub agent's fraudulent disposition of the goods within the course of his employment. The last clause of this section, giving a principal in cases of fraud or wilful wrong the right of recourse to the sub agent, does not exclude the principal's normal right of recourse to his agent. In fact, the total effect of the section is to give an option to the principal where a fraud or wilful wrong is committed by the sub agent (m)

**193.**—Where an agent, without having authority to do so, has appointed a person to act as a sub agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons, the principal is not represented by or responsible

(l) Bowen L.J. in *Montagu v Forwood* [1893] 2 Q B 350 355 *Op New Zealand and Australian Land Co v Watson* (1891) 7 Q B Div 374

(l) *Peacock v Baijnath* (1891) 18 Cal 573, 613, L R 18 I A 78

(m) *Nensukhdas v Birdichand* (1917) 19 Bom L R 948 43 I C 699 The

agent in this case was a commission agent acting for an up country constituent and the sub agent was a muckadam employed by the commission agent. As to the position of a dubash in Madras see *South Indian Industrials Ltd v Munda Rama Jogi* (1914) 27 Mad L J 201, 26 I C 872

4. for the acts of the person so employed, nor is that person responsible to the principal

If the sub agent purports to act in the name of the ultimate principal, that principal may adopt his acts by ratification, as he might adopt acts purporting to be done on his behalf by any other person (ss 196—200, pp 580—586, below) But it is conceived that if a sub agent acts in his own name or in that of the agent who has taken on himself without authority to delegate to him business which is in fact the principal's, the acts so done cannot be ratified by the principal

A person to whom a trust has been improperly delegated is not an agent of the beneficiaries, but he is not the less liable to account to them, independently of agency, for trust property which has come to his hands (n)

194.—Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub agent, but an agent of the principal for such part of the business of the agency as is entrusted to him

*Illustrations*

(a) A directs B his solicitor to sell his estate by auction and to employ an auctioneer for the purpose B names C an auctioneer to conduct the sale C is not a sub agent, but is A's agent for the conduct of the sale

(b) A authorises B a merchant in Calcutta to recover the money due to A from C & Co B instructs D a solicitor to take legal proceedings against C & Co for the recovery of the money D is not a sub agent but is solicitor for A

In such cases as are put in the illustrations B, as between A and the auctioneer or solicitor, is treated as merely the messenger of A's direct authority This section apparently means to draw a clearly marked line between an ordinary sub agent and a person who is put in relation with the principal a "substitute" as he is called in a passage already quoted above (o) The distinction is probably convenient, though we cannot find it so sharply defined in any English

(n) *Myler v Fitzpatrick* (1822) 6 Mad 360 23 B R 217, *Pe Barne*, [1892] Div 310 311 2 Ch 265 (o) *De Bussche v Alt* (1878) 8 Ch

authority. Apparently this section covers the case of an upper servant in a household who has authority to select and dismiss under-servants, although the language is perhaps not the most appropriate. Such a servant, at any rate, is not answerable to third persons for acts or defaults of those under him which he has not specifically authorised (p).

A receiver appointed to carry on a business by mortgagees, trustees for debenture-holders, or the like, appears to be in a similar position (q), though it by no means follows that those who appoint him under the special powers conferred on them for that purpose, whether by law or by agreement of parties, are liable as principals for his acts (r). In Bombay, the appointment of a muccadam by a commission agent acting for an up-country constituent is an ordinary case of the appointment of a sub-agent. The muccadam is not a substituted agent of the up-country constituent (s).

The following section and this section, read together, show that they do not apply to the case of an agent being instructed to hand over all or part of the business to a certain named person and no other, in such case he is not answerable for the capacity or conduct of that person; his duty is done when he has established relations between the substituted agent and the principal, and then ss. 191, 192 have no place (t).

**195.**—In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Agent's duty in naming such person.

#### Illustrations

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently, and the ship turns out to be unseaworthy, and is lost. B is not, but the surveyor is, responsible to A.

(p) "It was never heard of that a servant who hires labourers for his master was answerable for all their acts" *Stone v Cartwright* (1795) 6 T R 411; 3 R R 220

(q) *Owen & Co v Cronk* [1895] 1 Q B 265. See per Lord Esher at p 272

(r) *Gosling v Gaskell* [1897] A C 575

(s) *Nensukhdas v Birdichand* (1917) 19 Bom L R 948, 960, 43 I C 699. As to a dubash in Madras, *South Indian Industrials Ltd v Minds Pama Joji* (1914) 27 Mad L J 501, 26 I C 822

(t) *T C Choudhury & Bros v Girindra Mohan Neogi* (1929) 56 Cal 686, 121 I C 636.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Little, if any, direct authority can be produced for this rule (u), but it is not open to doubt in English law. Were it otherwise, no man would take the responsibility of choosing an agent for another without an express indemnity.

### *Ratification.*

196.—Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Right of person as to acts done for him without his authority. Effect of ratification.

**Conditions of ratification :** “On behalf of another.”—The rules on this subject are now familiar in the Common Law. Some of them are perhaps over subtle, but on the whole they are for the advantage of commerce. Ratification must be by the person for whom the agent professes to act. “That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority” (v). But “where A does an act as agent for B without any communication with C, C cannot, by afterwards adopting that act, make A his agent and thereby incur any liability, or take any benefit, under the act of A” (w). “Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf

(u) See, however, *Cahill v Dawson* Gr 230, 243 64 R R 770 776, per Cur (1857) 3 C B N S 106, 111 R R 565 (w) *Ib*, head note (v) *Holmes v Tupperman* (1843) 6 Man L

of the ratifier. And this rule is recognised in s 196 of the Indian Contract Act' (x)

"A ratification of the unauthorised contract of an agent can only be effectual when the contract has been made by the agent avowedly for, or on account of, the principal and not when it has been made on account of the agent himself" (y)

A man cannot adopt by ratification an act which was not authorised by him at the time and did not purport to be done on behalf of any principal ( )

Since a ratification is in law equivalent to a previous authority, a person not competent to authorise an act cannot give it validity by ratifying it (a)

"Ratification must be by an existing person on whose behalf the contract might have been made at the time" (b). Thus a newly formed company cannot ratify an act done in its name before it was incorporated (c). And where a time is limited for doing an act and A does it on behalf of B but without his authority, within that time, B can ratify it only before the time has expired (d).

The person on whose behalf an act purports to be done need not be individually known to the agent, it is enough if he is ascertainable as owner of specified property or the like. A man may effect an insurance on behalf of all persons interested, and any such person may adopt the contract of insurance for his own share by ratification (e). A bailiff may receive the rent of land on behalf of the unknown heirs of the last owner in possession and those heirs when their title is ascertained, can ratify his acts (f).

(x) *Paya Pas Bhagwat Dayal Singh v Debi Dayal Sahu* (1908) 12 C W N 393 408 L R 35 I A 48 58

(y) *Per Cur in Shiddheshwar v Ram Chandrarav* (1889) 6 Bom 463 466

(z) *Keighley Marted & Co v Durant* [1901] A C 240 (the decision of the C A which the H L reversed [1900] 1 Q B 600 was certainly novel) *Pagharachari v Pakkiri Mahomed* (1916) 30 Mad L J 497 501 34 I C 760

(a) *Irvine v Union Bank of Australia* (1877) 3 Cal 280 285 L R 4 I A 86 2 App Ca 366

(b) *Kelner v Baxter* (1886) L R 2 C P 174 180

(c) *In re Press Engineering Co* (1880) 16 Ch Div 120 *Ganesh Flour Mills Co v Puran Mal* (1905) Punj Rec no 2

(d) *Dobbins v Dobbins* [1896] 2 Ch 348

(e) *Hagedorn v Oliverson* (1814) 2 M & S 480 15 P R 317. And such ratification is good even after known loss *Williams v North China Insurance Co* (1876) 1 C P Div 757

(f) *Lyell v Kennedy* (1889) 14 App Ca 437 456

“Acts done without knowledge or authority.”—An act done by an agent in excess of his authority may also be ratified (g) But “there is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future” Therefore the ratification by a company of certain acts done by its directors in excess of the authority given to them by the articles of the company does not extend the authority of the directors so as to authorise them to do similar acts in future (h)

**Retrospective effect**—Ratification, if effective at all, relates back to the date of the act ratified If an action is brought in a man's name without his knowledge, he may adopt the proceedings and make them good at any time before trial (i) The rule goes so far that if A makes an offer to B which Z accepts in B's name without authority, and B afterwards ratifies the acceptance, an attempted revocation of the offer by A in the time between Z's acceptance and B's ratification is inoperative (j) So long as the professed agent purports to act on behalf of the principal, it is immaterial whether in his own mind he intends the principal's benefit or not, and what his real motive and intention may be, nor does it make any difference if the third party discovers before ratification that the agent meant to keep the contract for himself (k) In fact, the third party gets by the ratification exactly what he bargained for

But if Z pays money to B as in satisfaction of A's debt, and B, afterwards discovering that Z had no authority, returns him the money by agreement between them, A can no longer adopt the payment and rely on it as a discharge A man is not bound to accept payment of a debt, or satisfaction of any other obligation, from a stranger to the contract, though, if B had accepted the payment with

(g) *Secretary of State v. Kamachee Boye* (1859) 7 M 1 A 476

(h) *Irvine v. Union Bank of Australia* (1877) 3 Cal 280, 287, L R 4 I A 86, 2 App Ca 369, 375

(i) *Ancona v. Marks* (1862) 7 H & N 686, 126 R R 616 The action was on negotiable instruments, and the most plausible form of the argument for the defence was that the plaintiff was not the holder of the instruments at the time of

suing

(j) *Bolton Partners v. Lambert* (1889) 41 Ch Div 295 This decision has been freely criticised, but for the present remains authoritative It is open to reconsideration in a Court of last resort see the judgment of the Judicial Committee in *Fleming v. Bank of New Zealand* [1900] A C 677, 687

(k) *Pe. Teichmann and Ledermann Feres* [1899] 2 Q B 66

knowledge of Z.'s want of authority, or acquiesced in it after he obtained that knowledge, he would have been estopped from denying Z.'s authority as against A. (l).

**What acts cannot be ratified.**—A transaction which is void *ab initio* cannot be ratified (m). This is illustrated in England by a line of cases in company law marking the distinction between irregularities capable of being made good if the act is ratified by a general meeting, or the whole body of shareholders, and acts not within the company's objects as defined by its original constitution, and therefore incapable of being made binding on the company by any ordinary means known to the law (n). It is not clear whether this rule extends to the case of a forged signature so as to prevent the person whose signature has been forged from adopting the instrument even for civil purposes (o). That such adoption would not relieve the forger from criminal liability is admitted. In any case it would seem that there is no question of agency unless the offender purports to sign by procuration. It is beyond our scope to consider under what conditions a man may be estopped by his own words or conduct, apart from agency or ratification, from denying that a certain signature was his.

**Agents of Government.**—Acts done by public servants in the name of the Crown, or the Government of India, may be ratified by subsequent approval in much the same way as private transactions (see *Secretary of State v. Kamachee Boye* (p) and *Collector of Masulipatam v. Cavalry Vencata* (q)). In these cases the effect may not be to create legal duties but, where the acts in question are of the kind known as "acts of State," to preclude courts of law from entertaining any claim founded upon them (r). Such acts are political, and outside the scope of municipal law, and cannot, in ordinary circumstances, occur within the jurisdiction.

(l) *Halter v James* (1871) L R 6 Ex 124. The language of Kelly C B about "mistake in fact" is not incorrect, but also not luminous.

(m) *Mauji Ram v Tara Singh* (1881) 3 All 852 (not an ordinary case of agency, but the principle is the same).

(n) See Pollock on Contract, Appendix, Note D.

(o) In 1871 the majority of the Court of Exchequer held that such an adoption

did not create a cause of action. *Brook v Hook*, L R 6 Ex 89. Ten years later Lord Blackburn expressed a decided opinion that it would. *McKenzie v. British Linen Co.*, 6 App Ca 82, 99.

(p) (1859) 7 M I A 476.

(q) (1860) 8 M I A 529, 534.

(r) *Euron v Denman* (1847) 2 Ex. 167, 76 R R 554, see more in Pollock on Torts, 12th ed 114.

**197.**—Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done

Ratification may be expressed or implied

*Illustrations*

(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account. B's conduct implies a ratification of the purchase made for him by A.

(b) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

**Express ratification.**—An express ratification cannot become complete until it is communicated, till then it is liable to revocation (s)

**Implied ratification.**—Assent to an act done on one's behalf, like consent to an agreement, may be conveyed otherwise than in words (cp s. 9, p. 62, above), and taking the benefit of the transaction is the strongest, as it is the most usual, evidence of tacit adoption. Accepting the results of the agent's proceeding, whether obviously beneficial to the principal or not, will have the same effect (t). Where an agent, without authority to do so, referred certain matters to arbitration, and the principal, after knowledge of the arbitration proceedings, acquiesced in them and did not raise any objection thereto, it was held that his conduct amounted to a ratification of the reference (u).

**198.**—No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective

Knowledge requisite for valid ratification

English authority is to the effect that a principal is not liable for excessive or irregular execution of his authority (nor *a fortiori* for a wholly unauthorised act done on his behalf) unless he ratifies the act with knowledge of the irregularity, or shows an intention "to take upon himself, without inquiry, the risk of any irregularity" (v). More lately

s) *Pajagopalacharyulu v The Secretary of State for India* (1913) 38 Mad 99, 1008, 22 I C 107

(t) A buys a speculative stock in P's name without authority thereby involving P in loss. It may be a question of fact whether money ultimately realised by resale at a loss and paid by A to P was taken by A in such a way as to

amount to ratification or only as compensation due from A. *Kaliresan Chettiar v Iamanathan Chetti*, 102 I C 561, A I R 1927 Mad 478 (long unprofitable report of complicated facts)

(u) *Saturjit Pershad Pabaloor v Dulhin Gulab Aker* (1897) 24 Cal 409

(v) *Lewis v Loe* (1845) 13 M & W 831, 67 P R 828

the Judicial Committee laid down in general terms that "acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal and to which effect may be given as against the party by his acquiescence in and adoption of the transaction" (w). The two latter conditions might perhaps have been more clearly expressed. Still more lately the Court of Appeal in England has said "To constitute a binding adoption of acts *a priori* unauthorised these conditions must exist (1) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were". Reluctant ratification by a solicitor of an unauthorised use of his name which is represented as merely formal and at the time reasonably appears so, will not make him, still less his firm, liable for the loss caused to third persons by money having been taken out of court under the assumed authority, and afterwards misapplied (x).

The Act does not expressly deal with the possible case of the principal deliberately waiving inquiry so as to make the agent's act his own at all hazards. Such cases fall under the general rule that a free agent may waive a legal advantage if he thinks fit, and there is no reason to suppose that the English authorities would not be followed.

199.—A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part

Effect of ratifying unauthorised act forming part of a transaction

It is obvious that a man cannot at his own choice ratify part of a transaction and repudiate the rest (y). The only possible exception is in the case of the part repudiated being wholly for the principal's benefit, which is not likely to occur. The general rule is that "where

(w) *La Banque Jacques Cartier v La Banque d'Epargne* etc (1887) 13 App Ca 111. The appeal was from the Province of Quebec but the principle is one of universal jurisprudence.

(x) *Marsh v Joseph* [1897] 1 Ch 213 246.

(y) See *Healy v Fenwick* (1876) 1 C P D 745 753. Authority is really needless.

a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent": S. A. § 250.

**200.**—An act done by one person on behalf of another without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect (z).

Ratification of unauthorised act cannot injure third person.

*Illustrations.*

(a) A, not being authorised thereto by B, demands, on behalf of B the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver (a).

(b) A holds a lease from B, terminable on three months' notice. C, an authorised person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A (b).

This is the converse of the principle that a voidable transaction cannot be rescinded to the prejudice of third persons' rights acquired under it in good faith. Rights of property cannot be changed retrospectively by ratification of an act inoperative at the time. The rule is also stated in the form that ratification, to make an act rightful which otherwise would be wrongful, must be at a time when the principal could still have lawfully done it himself (c). The ratification of a contract does not give the principal a right to sue for a breach committed prior to the ratification (d). A. holds a lease from two joint receivers, B. and C. B., without C.'s authority, gives notice to quit to A. The notice cannot be ratified by C. so as to be binding on A (e).

(z) Authority is not needed to show that this section does not apply where no third person would be prejudiced, for illustration, if desired, see *Garapati Narasimudu v. Basara Santharam*, 85 I C 139, A I R 1925 Mad 219

(a) S A § 247. Cp *Bird v. Brown* (1850) 1 Ex 786, 80 R R 775, where the act was stoppage in transit, and the recognition of the same rule in the House of Lords in *Lyell v. Kennedy* (1859) 14 App Ca 437, 461, 462.

must be binding on all parties concerned at the time when it is given. *Right d Fisher v Cuthell* (1804) 5 East, 491, 7 R R 752, from which this illustration appears to be simplified

(c) *Bird v Brown* (1850) 4 Ex 786; 80 R R 775

(d) *Kidderminster v. Hardwick* (1873) L R 9 Ex 13

(e) *Cassim Ahmed v. Fusuif Haji Ajari* (1916) 23 Cal L J 453, 34 I C 221. Joint receivers, unlike joint owners, should all join in giving the notice

(b) Such a notice, in order to be good,

### *Relocation of Authority*

**201.**—An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency, or by the business of the agency being completed, or by either the principal or agent dying or becoming of unsound mind, or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors

This is English law, subject to the remark that there is little authority as to the case of insanity, and it was formerly thought that insanity of either principal or agent would determine the agency only if it had been judicially established by "inquisition" (f) But it seems the true rule is that the principal's insanity in fact is sufficient to annul the agent's authority (g) The present section has in any case, made the law clear in India We have to read it with the following ones to 210 inclusive, which modify its effect in various ways

**Completion of business of agency**—The Allahabad and Calcutta High Courts hold that where an agent for the sale of goods receives the price, the agency does not terminate on the sale of the goods, but continues until payment of the price to the principal Sec 218 (p 611, below) provides "that an agent is bound to pay to his principal all sums received on his account Clearly then the business does not terminate on receipts of the money by the agent inasmuch as there is a subsequent obligation to account for the sums and to pay them" (h) In a Madras case, Wallis C J expressed the opinion that the agency terminates when the sale is completed and that it does not continue until payment of the price (i) The question in the above cases was one of limitation (j) But the authority of an agent for sale to contract on the principal's behalf ceases as soon as the sale is completed He

(f) Kent Comm ii 615

(1899) 26 Cal 115 114 125

(g) So assumed in *Longe v Toynbee* [1910] 1 K B 215 C A

(i) *Benlatachalam v Varajagan* (1914) 39 Mad 363 373 379 26 I C 740

(h) *Abu Jam v Pam Dayal* (1890) 12 All 541, followed in *Fink v Buldeo Dass*

(j) See the Limitation Act 1908 s 4 I art 89

2. for instance, in the present case . the goods are consigned to a factor for sale This confers an implied authority to sell Afterwards the factor makes advances This is not an authority coupled with an interest, but an independent authority, and an interest subsequently arising The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable, but such an effect will not, we think, arise independently of agreement" (q) The material variation of the facts in this case which is given in illustration (b) does amount to evidence of agreement Whether there is such an agreement in a particular case is a question of fact (r) Indian decisions, as we shall immediately see, take the same line The Act itself is, of course, the primary authority (s)

A direction by A to B to receive income payable to A, and apply it towards discharge of A's debt to Z, is obviously not an authority coupled with an interest in B, whether the revocation of it would or would not be a breach of any contract between A and Z, but in such circumstances loosely worded or ambiguous new instructions from A to B will not be readily construed as a revocation (t)

An example of a transaction including such an agreement as the rule requires is that of an "underwriting contract" addressed to the vendor promoter of a new company Here we have a bargain by which, for valuable consideration in the form of commission the underwriter agrees to take certain shares, and thus he knows to be for the benefit of the promoter, who is to be paid out of money raised by the issue of shares, and in order to enable the promoter the better to secure the performance of the contract the underwriter authorises the promoter to apply for shares in his name, and expressly agrees not to revoke that authority The authority is coupled with an interest and an allotment of shares to the underwriter on the promoter's application makes him a member of the company notwithstanding an attempted revocation in the meantime (u)

(q) *Smart v Sanders* (1848) 6 C R 895 918 75 R I 849 And see *Frith v Frith* [1906] A C 254

(r) *De Comas v Frost* (1865) 3 Moo P C (N S) 158

(s) See 17 Bom at pp 513 515, 20 Mad at p 103

(t) *Clerk v Laurie* (1857) 2 H & N

199 115 R R 482 argued mainly on the question whether the authority was revocable but decided on the ground that in any case there was nothing amounting to revocation

(u) *Carmichael's Case* [1906] 2 Ch 613 647

**Indian authorities**—The interest which an agent has in effecting a sale and the prospect of remuneration to arise therefrom do not constitute such an interest as would prevent the termination of the agency (v) Upon the same principle where an agent is appointed to collect rents and his salary is agreed to be paid out of those rents it does not give the agent an interest in the subject matter of the agency within the meaning of this section (w) But where an agent is authorised to recover a sum of money due to a third party to the principal and to pay himself out of the amount so recovered, the debts due to him from the principal, the agent has an interest in the subject matter of the agency and the authority cannot be revoked (x)

**Factors for sale of goods**—The question has often arisen as to whether a factor who has made advances as against goods consigned to him for sale has such an interest in the goods consigned as to prevent the termination of his authority to sell The result of the cases appears to be that the authority of a factor to sell is in its nature revocable and the mere fact that advances have been made by him whether at the time of his employment as such or subsequently cannot have the effect of altering the revocable nature of the authority to sell unless there is an agreement express or implied between the parties that the authority shall not be revoked (y) Where the factor is expressly authorised to repay himself the advances out of the sale proceeds as in illustration (b) he has an interest in the goods consigned to him for sale and the authority to sell cannot be revoked In such a case an interest in the property is expressly created But the interest need not be so created and it is enough to prevent the termination of the agency that the interest could be inferred from the language of the instrument and from the course of dealings between the parties This is where a factor who had made advances as against goods consigned to him for sale was authorised to sell them at the best price obtainable and in the event of a shortfall to draw out the balance it was held that the

(v) *Lal Bahadur v. Chakrabarti* (1891) 14 Cal. 100; *Chakrabarti v. Lal Bahadur* (1891) 14 Cal. 100; *Lal Bahadur v. Chakrabarti* (1891) 14 Cal. 100.

(w) *Lal Bahadur v. Chakrabarti* (1891) 14 Cal. 100; *Chakrabarti v. Lal Bahadur* (1891) 14 Cal. 100; *Lal Bahadur v. Chakrabarti* (1891) 14 Cal. 100.

(x) *Lal Bahadur v. Chakrabarti* (1891) 14 Cal. 100; *Chakrabarti v. Lal Bahadur* (1891) 14 Cal. 100; *Lal Bahadur v. Chakrabarti* (1891) 14 Cal. 100.

(y) *Lal Bahadur v. Chakrabarti* (1891) 14 Cal. 100; *Chakrabarti v. Lal Bahadur* (1891) 14 Cal. 100; *Lal Bahadur v. Chakrabarti* (1891) 14 Cal. 100.

arrangement gave an interest to the factor in the goods and that the authority to sell could not be revoked (z)

**203.**—The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal [S A § 465]

When principal  
may revoke agent's  
authority

**What amounts to exercise of authority**—An agent authorised to purchase goods on behalf of his principal cannot be said to have exercised the authority so given to him so as to bind the principal "if he merely appropriates to the principal a contract previously entered into by himself with a third party. Such an appropriation does not create a contractual relation with a third party, and the principal, therefore, may revoke the authority (a)

Authority given to an auctioneer to sell goods by auction may be revoked at any time before the goods are knocked down to a purchaser (b) and authority given to a policy broker to effect a policy at any time before the policy is executed so as to be legally binding (c) Authority to pay money in respect of an unlawful transaction may be revoked at any time before it has actually been paid even if it has been credited in account (d)

**204**—The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency

Revocation  
where authority  
has been partly  
exercised

*Illustrations*

(a) A authorises B to buy 1 000 bales of cotton on account of A and to pay for it out of A's money remaining in B's hands. B buys 1 000 bales of cotton in his own name so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton [Cp D 17 1 *Mandati vel contra* 15]

(z) *Kondajya v Narasimulu* (1896)  
20 Mad 97

(a) *Lakshmichand v Chotooram* (1900)  
21 Bom 403

(b) *Harlow v Harrison* (1859) 1 F  
& L 309 117 R R ...; *In re Hare &*  
*O More & Contract* [1901] 1 Ch 93

(c) *Harwick v Slade* (1811) 3 Camp  
127, 13 R R 772 *Cp Thompson v*

*Idams* (1889) 23 Q B D 361

(d) *Edgar v Fowler* (1803) 31 Ast 200  
7 R R 431 *Taylor v Bowers* (1870) 1  
Q B Div 291, *Hastelow v Jackson*  
(1899) 8 B & C 21 30 R R 303



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When principal  
may revoke agent's  
authority

**What amounts to exercise of authority**—An agent authorised to purchase goods on behalf of his principal cannot be said to have exercised the authority so given to him 'so as to bind the principal' if he merely appropriates to the principal a contract previously entered into by himself with a third party. Such an appropriation does not create a contractual relation with a third party, and the principal therefore may revoke the authority (a)

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*Illustrations*

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(z) *Kondajya v Narasimulu* (1836)  
20 Mad 97

(a) *Lakshmichand v Chotooram* (1900)  
24 Bom 403

(b) *Warlow v Harrison* (1859) 1 E  
& E 309 117 R R 227, *In re Hare &  
O More's Contract* [1901] 1 Ch 93

(c) *Warwick v Slade* (1811) 3 Camp  
127 13 R R 772 *Cp Thompson v  
Idams* (1889) 23 Q B D 361

(d) *Edgar v Fowler* (1803) 3 East 292  
7 R R 433 *Taylor v Bouwers* (1876) 1  
Q B D v 291, *Hastelow v Jackson*  
(1878) 8 B & C 221 37 R R 369



**Compensation for revocation**—By this section “the principal is bound to make compensation to the agent whenever there is an express or implied contract that the agency shall be continued for any period of time. This would probably always be the case when a valuable consideration had been given by the agent” (h)

The valuable consideration here spoken of must be something more than undertaking the agency. Where A appointed B as exclusive agent for the sale of A's coal in Liverpool for seven years, and B undertook not to sell any other owner's coal there during that time without A's consent, this was decided by the House of Lords not to imply any condition that A should continue to keep his colliery during the term. “Upon such an agreement as that . . . , unless there is some special term in the contract that the principal shall continue to carry on business, it cannot for a moment be implied as matter of obligation on his part that, whether the business is a profitable one or not, and whether for his own sake he wishes to carry it on or not, he shall be bound to carry it on for the benefit of the agent and the commission that he may receive” (i)

There is a class of cases in which an agent for sale, having proceeded far enough in the transaction to be entitled to commission on its completion, has been deprived of his commission by the principal putting an end to the whole matter. But these cases do not depend on the rule here laid down, or on any rule peculiar to the law of agency. They are examples of the rule that one party to a contract must not prevent another from performing his part (ss 53-67, pp 315, 380, above), or “each party is entitled to the full benefit of his contract without hindrance from the other” (j). See further the commentary on s 219, p 615, below.

**206.**—Reasonable notice must be given of such revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other. [S A § 478]

Notice of revocation or renunciation

(h) *Per Cur* in *Vishnucharja Ram chandra* (1881) 5 Bom 253-256

(i) *Rhodes v Forwood* 1876) 1 App Ca 256, per Lord Penzance at p 272  
*Cp Hamlyn & Co v Wood & Co* [1891] 2 Q B 488, C A (not a case of agency)

(j) *Prickett v Badger* (1856) 1 C B N S 296, 107 R R 608, *Inchbold v Western Aislerry Coffee, etc., Co* (1861) 17 C B N S 733 142 R R 603. See the judgment of Willes J

An authority given by two or more principals jointly may be determined by notice of revocation or renunciation being given by or to any one of the principals (l).

Revocation and renunciation may be expressed or implied

207.—Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

*Illustration.*

A. empowers B to let A.'s house. Afterwards A. lets it himself. This is an implied revocation of B's authority. [S. A. § 474]

208.—The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

When termination of agent's authority takes effect as to agent, and as to third persons.

*Illustrations.*

(a) A directs B to sell goods for him, and agrees to give B 5 per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A., and B is entitled to five rupees as his commission.

(b) A, at Madras, by letter, directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B., his agent, to pay certain money to C. A dies, and D. takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D., the executor.

**Time from which revocation operates.**—"Revocation by the act of the principal takes effect as to the agent from the time when the revocation is made known to him; and as to third persons when it is made known to them, and not before" [S. A. § 470]

Except as to illustration (c), which removes an anomaly, this section is in accordance with the common law. When A. trades as B.'s agent with B.'s authority (even though the business be carried on in A.'s name, if the agency is known in fact), all parties with whom A. makes contracts in that business have a right to hold B. to them

until B gives notice to the world that A's authority is revoked, and it makes no difference if in a particular case the agent intended to keep the contract on his own account (l)

Illustration (c) follows the rule of the Roman law and systems derived from it against the English authorities, which are admitted to be unsatisfactory (m) Accordingly an acknowledgment of a debt made by an agent, though after the death of the principal, binds the estate of the principal provided the creditor has no knowledge at the time of the death of the principal and the acknowledgment amounts to a "reasonable step [taken by the agent] for the protection and preservation" of the assets of the principal within the meaning of s 209 (n)

If the authority of an agent to admit execution of a document is revoked before the registration thereof, but such revocation is not known either to the grantee of the document or the registering officer, the document is not invalidated, though it is registered by the agent after the revocation of his authority (o)

**209.**—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him

See S A §§ 491 492 There does not seem to be any English authority

(l) *Trueman v Loder* (1840) 11 A & E 406  
589 52 R R 451

(m) In England the principal's estate is not liable on the contract but perhaps may be liable for actual loss *Dreu v Nunn* (1879) 4 Q B Div 616 *Blades v Free* (1829) 9 B & C 167 32 R R 620, but the agent is liable on implied warranty of authority *Yonge v Toynbee* [1910] 1 K B 215 C A Nor can the agent recover agreed remuneration from the principal's estate for service in the business of the agency performed after the principal's death *Campanari v Woodburn* (1854) 15 C B 400, 100 R R

(n) *Ebrahim Haji Yakub v Chundal* (1911) 35 Bom 302 10 I C 888

(o) *Mohendra Nath v Kals Proshad* (1902) 30 Cal 265 The Lahore High Court held in *Moosajee v Administrator General of Bengal* (1921) 3 Lah L J 265 that the manager of a distillery was empowered under this section to enter into contracts for the purchase of molasses after the death of the proprietor If it was within his ordinary authority, and he had not heard of the principal's death one fails to see what there was to report

An agency is terminated under s 201 by the death of the principal. If the agent thereafter continue in service of the principal's heirs, a new agency is created. There is nothing in this section to indicate that the agency continues on the old terms (p). See notes to s 203, p 595, above.

**210.**—The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub agents appointed by him.

Termination of  
sub agent's autho-  
rity

As a general rule this is obvious. There may be cases where a substitute rather than a sub-agent has been appointed, and there appears by express agreement or by the nature of the case an intention that his authority shall not be determined when that of the original agent is revoked. S A § 469.

### *Agent's Duty to Principal*

**211.**—An agent is bound to conduct the business of his principal according to the directions given by the principal or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Agent's duty in  
conducting prin-  
cipal's business

#### *Illustrations*

(a) A, an agent engaged in carrying on for B a business in which it is the custom to invest from time to time at interest the moneys which may be in hand, omits to make such investments. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

#### *Additional Illustrations*

(c) An agent, instructed to warehouse goods at a particular place, warehouses a portion of them at another place, where they are des-

until B gives notice to the world that A's authority is revoked, and it makes no difference if in a particular case the agent intended to keep the contract on his own account (*l*)

Illustration (c) follows the rule of the Roman law and systems derived from it against the English authorities, which are admitted to be unsatisfactory (*m*) Accordingly an acknowledgment of a debt made by an agent, though after the death of the principal, binds the estate of the principal provided the creditor has no knowledge at the time of the death of the principal and the acknowledgment amounts to a "reasonable step [taken by the agent] for the protection and preservation" of the assets of the principal within the meaning of s 209 (*n*)

If the authority of an agent to admit execution of a document is revoked before the registration thereof, but such revocation is not known either to the grantee of the document or the registering officer, the document is not invalidated, though it is registered by the agent after the revocation of his authority (*o*)

**209.**—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him

Agent's duty on termination of agency by principal's death or insanity

See S A §§ 491, 492 There does not seem to be any English authority

(*l*) *Trueman v Loder* (1840) 11 A & E 406  
589, 52 R R 451

(*m*) In England the principal's estate is not liable on the contract but perhaps may be liable for actual loss *Drew v Nunn* (1879) 4 Q B Div 616 *Blades v Free* (1879) 9 B & C 167, 32 R R 620, but the agent is liable on implied warranty of authority *Yonge v Toynbee* [1910] 1 K B 215 C A Nor can the agent recover agreed remuneration from the principal's estate for service in the business of the agency performed after the principal's death *Campanari v Woodburn* (1854) 15 C B 400 100 R R

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An agency is terminated under s 201 by the death of the principal. If the agent thereafter continue in service of the principal's heirs, a new agency is created. There is nothing in this section to indicate that the agency continues on the old terms (p). See notes to s 208, p 595, above.

**210.**—The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub agents appointed by him.

Termination of sub agent's authority

As a general rule this is obvious. There may be cases where a substitute rather than a sub agent has been appointed and there appears by express agreement or by the nature of the case an intention that his authority shall not be determined when that of the original agent is revoked. S A § 469.

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Agent's duty in conducting principal's business

#### *Illustrations*

(a) A, an agent engaged in carrying on for B a business in which it is the custom to invest from time to time at interest the moneys which may be in hand omits to make such investments. A must make good to B the interest usually obtained by such investments.

(b) B, a broker in whose business it is not the custom to sell on credit sells goods of A on credit to C whose credit at the time was very high. C before payment becomes insolvent. B must make good the loss to A.

#### *Additional Illustrations*

(c) An agent instructed to warehouse goods at a particular place, warehouses a portion of them at another place where they are des-

until B gives notice to the world that A's authority is revoked, and it makes no difference if in a particular case the agent intended to keep the contract on his own account (l)

Illustration (c) follows the rule of the Roman law and systems derived from it against the English authorities, which are admitted to be unsatisfactory (m) Accordingly an acknowledgment of a debt made by an agent, though after the death of the principal, binds the estate of the principal provided the creditor has no knowledge at the time of the death of the principal and the acknowledgment amounts to a "reasonable step [taken by the agent] for the protection and preservation" of the assets of the principal within the meaning of s 209 (n)

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See S A §§ 491, 492 There does not seem to be any English authority

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#### *Illustrations*

(a) A, an agent engaged in carrying on for B a business in which it is the custom to invest from time to time at interest the moneys which may be in hand omits to make such investments. A must make good to B the interest usually obtained by such investments.

(b) B, a broker in whose business it is not the custom to sell on credit sells goods of A on credit to C whose credit at the time was very high. C before payment becomes insolvent. B must make good the loss to A.

#### *Additional Illustrations*

(c) An agent instructed to warehouse goods at a particular place, warehouses a portion of them at another place where they are des-

troyed, without negligence He is liable to the principal for the value of the goods destroyed [*Lalley v Doubleday* (1881) 7 Q B D 510]

(d) An agent, instructed to insure goods, neglects to do so He is liable to the principal for their value in the event of their being lost [*Smith v Lascelles* (1788) 2 T R 187, 1 R R 457]

(e) A broker, entrusted with goods for sale, sells them by auction at an inadequate price, not having made an estimate of the value in accordance with the custom of the particular trade He must make good the loss [*Solomon v Barker* (1862) 2 F & F 726, 121 R R 828]

(f) An auctioneer, contrary to the usual custom, takes a bill of exchange in payment of the price of goods sold He is liable to the principal for the amount of the bill in the event of its being dishonoured [*Ferrers v Robins* (1835) 2 C M & R 152]

**Departure from instructions**—In *Bostock v Jardine* (g) the defendants were authorised to buy a certain quantity of cotton for the plaintiff "Instead of complying with their instructions, they bought a much larger quantity for the plaintiff and divers other people," so that there was no contract on which the plaintiff could sue as principal Accordingly, "though a contract was made, it was not the contract the plaintiff authorised the defendants to make," and the plaintiff was entitled to recover back a sum paid to the defendants on account of the purchase money In an old equity case where a landowner's steward was also lessee of part of the property, and in that capacity had made profitable arrangements with adjacent owners it was held "that the benefit he had got as lessee by the use of the property should, upon reasonable terms, be acquired for his landlord and not for himself" (r)

It is not an agent's duty to obey instructions which are unlawful If, at a sale by auction without reserve, the auctioneer is instructed not to sell for less than a certain price, he is not liable to the principal for accepting the highest *bona fide* bid, though it may be lower than that price (s).

**"If any loss be sustained."**—Where an agent sells his principal's

(g) (1865) 3 H & C 700

(s) *Bezwell v Christie* (1776) Comp

(r) *Beaumont v Boulbee* (1802) 7 Ves 395

goods in breach of his duty below the limit placed upon them by the principal the measure of damages is the actual loss which the principal has sustained, and not the difference between the price at which they are sold and the limit of price placed on the goods Where no loss is suffered, the principal is entitled at least to nominal damages, the sale being wrongful (t)

The measure of damages where an agent, who had been instructed not to part with the possession of certain goods until they are paid for, parted with them without payment, was held to be the value of the goods the purchaser having failed to pay the price (u)

As to the duty to account for profits, see s 216 and commentary thereon p 608, below

**Custom of trade**—According to the custom of trade in Bombay, when a merchant requests or authorises a firm to order and to buy and send goods to him from Europe at a fixed price net free godown, including duty, or free Bombay harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant (v)

**Usage of the Bombay market known as the *pakka adat* system**—The following are the incidents of a contract entered into on *pakka adat* terms—

(1) The *pakka adatia* has no authority to pledge the credit of the up country constituent to the Bombay merchant and no contractual privity is established between the up country constituent and the Bombay merchant

(2) The up country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent and thereby for practical purposes cancel the same

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(t) *Manchabhai v Tod* (1874) 30 Bom 633 *Chelapathi v Suryaya* (1907) 12 M L J 375 Much less can an agent claim from the principal expenses incurred in acting contrary to instructions *Mathra Das Vastadhi Lal v Kishan Chand Jainy Das* 80 I C 57 A 11 1905 Lah 332

(u) *Seeringe Co v H. K. Nair* (1874) 17 C B N S 50 1421 1 15.

(v) *Paul Peter v Chet Javeri* (1907) 37 Bom 1

(3) The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent

The relation between the *pakka adatia* and the up country constituent is not the relation of agent and principal pure and simple. The precise relation may thus be described in the words of Jenkins C J —

“ I think the contract between the parties was one of employment for reward, and the incidents proved appear to me to converge to the conclusion that the contract of a *pakka adatia*, in circumstances like the present, is one whereby he undertakes or, to use the word in its non technical sense as business men on occasion do use it, guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted, or differences paid in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference

“ I do not say that there is no relation of principal and agent between the parties at any stage, there may be up to a point, and that this is legally possible is shown by Mellish L J in *Ex parte White (w)* where he speaks of ‘ a person who is an agent up to a certain point ’ So here there may have been that relationship in its common meaning for the purpose of ascertaining the price at which the order was to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when that stage is passed, I think the relation is not that of principal and agent, but of the nature I have indicated. Into this contract there is imported by the evidence of custom no such element of unreasonableness as would compel us to reject it on that score ” (x) In *Manulal Raghunath v. Radhakisson Ramjwan (y)* Macleod C J said the only distinction between a *pakka adatia* and broker who is liable on his contracts is that the former does not contract as agent, but as principal, in other words, the *pakka adatia* undertakes business for his principal, but the particular contracts by which he carries out that business are his own affair

(w) (1870-1871) L R 6 Ch 397, at p 403

(x) *Bhagwandas Narotamdas v. Kanji Deoji* (1906) 30 Bom 205 in app from (1900) 7 Bom L P 57, *Bhagwan Das v. Burjorji* (1917) I R 15 I A 29 32 33,

42 Bom 373, 377 378, 44 I C 284  
See also *Chandulal Sullal v. Sidhruthras Soojanrao* (1900) 29 Bom 291, *Kelirmal Bhuramal v. Sirajmal Gouindram* (1907) 33 Bom 361

(y) (1920) 45 Bom 386 62 I C 361

**Usage of the Bombay market known as the kachhi adat system in cotton business**—Under the *kachhi adat* system, when an *adatia* receives an order from an up country constituent for the sale or purchase of cotton, he sends for a broker and settles the rate with him. The rate so settled (z) becomes from that moment binding upon both the *adatia* and the broker, and the broker remains personally bound until he brings a party willing to take up the contract. The broker in such a case adopts one of two ways—he either procures a party willing to take up the contract and introduces him to the *adatia*, and the party and the *adatia* thus exchange *labalas* (contracts) with each other, or, where the broker has got a contract of his own ready, he agrees to transfer it to the *adatia* and brings together the *adatia* and the other party to his (broker's) contract, and these two then exchange *labalas* with each other. If, when the party is brought to the *adatia*, the market rate is the same as the rate settled by the *adatia* with the broker, the broker gets nothing beyond his commission. If the market rate is less than the rate originally settled by the broker, the difference between the two rates has to be borne by the broker and paid to the person with whom the original rate was settled. If, on the other hand, it is more, that person has to bear the difference and pay it to the broker. There is nothing unreasonable in such a usage (a).

**Bombay Silver Market**—There is a custom of the Bombay Silver Market for forward contracts that only shroffs are the ostensible buyers and sellers, though shroffs may have and often do have outside principals for whom they are acting. The shroffs when acting for principals, work sometimes for *kachhi adat* and sometimes for *pakka adat*. In the case of *kachhi adat* the *adatia* shroff guarantees the performance of the contract to the other shroff but does not guarantee its performance to his own principal. In the case of *pakka adat* the *adatia* shroff, who then acts for a higher rate of commission is liable as principal both to his own employer and to the other shroff. This custom whereby only shroffs are the ostensible parties is observed for two reasons agreeable to the Marwari shroffs—first that on every forward silver transaction a commission becomes payable to one or both of the Marwari shroffs,

(z) The rates are settled in consequence of constant fluctuation in the market which may rise or fall every two minutes.

(a) *Fakirchand Lalchand v Doolub Govindji* (1905) 7 Bom L R 213. As to

the discretion to call for margin in the Bombay Cotton Market *Deishi v Bhil amchand* (1926) 29 Bom L R 147 100 I C 993 A I R 1927 Bom 120.

214.—It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions

Agent's duty to communicate with principal

There does not appear to be any reported authority in point on this section Obviously the rule must be as stated

215.—If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transactions, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him

Right of principal when agent deals, on his own account in business, of agency without principal's consent

*Illustrations*

(a) A directs B to sell A's estate B buys the estate for himself in the name of C A, on discovering that B has bought the estate for himself may repudiate the sale if he can show that B has dishonestly concealed any material fact or that the sale has been disadvantageous to him

(b) A directs B to sell A's estate B, on looking over the estate before selling it finds a mine on the estate which is unknown to A B informs A that he wishes to buy the estate for himself but conceals the discovery of the mine A allows B to buy in ignorance of the existence of the mine A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option

Authoritative illustrations of the principle here laid down might be multiplied almost indefinitely from the English reports A few will suffice for all useful purposes The kind of case given in illustration (a) is the most common subject of animadversion, but there is no doubt that the rule is general "Where an agent employed to sell becomes himself the purchaser, he must show that this was with the knowledge and consent of his employer, or that the price paid was the full value of the property so purchased, and this must be shown with the utmost clearness and beyond all reasonable doubt" (x)

(x) Lord Lyndhurst, *Charter v Trevelyan* (1841) 11 Cl & F at p 732, 65 R R at p 316 In India it seems to be an ordinary question of fact, see

"It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper" (y)

For like reasons an agent for sale or purchase must not act for the other party at the same time, or take a commission from him unknown to the principal (z) or settle any claim of his against the principal on exorbitant terms thereby to increase his own profit (a) An agent must give his principal "the free and unbiassed use of his own discretion and judgment" (b)

A principal who seeks to set aside a transaction on the ground that the provisions of the section have been violated must take proceedings for that purpose within a reasonable time after becoming aware of the circumstances relied on (c)

English authorities do not recognise the qualifications added at the end of this section (d), and it does not appear why it was thought necessary to add them. The English doctrine may be thought to have been affected by the well known severity of Courts of Equity towards trustees, and to be in excess of a reasonable standard of ordinary commercial justice. In fact the special provisions of the Trusts Act, ss 51—54, are more stringent. However, in *Achutha Naidu v Oakley, Bourden & Co* (e) where an agent dealt on his own account in the business of the agency and bought the goods of his principals in the name of a dummy, it was held that the fraudulent concealment of his identity and the fact that he was competing in the same market brought the case within the present section

*Rameshardas Benarasidas v Tansookhra, Bashesharilal* 10<sup>o</sup> I C 366 A I R 19<sup>o</sup>7 Sind 195

(y) Willes J in *Mollett v Robinson* (1870) L R 5 C P at p 655 Local usage of a trade or market contravening the general rule is not binding on a principal not proved to have known it See S C in H L (1874) L R 7 H L 80<sup>o</sup>

(z) *Grant v Gold Exploration etc Syndicate of British Columbia* [1900] 1 Q B 233 is a modern example

(a) *Mathra Das Jagan Nath v Jivan*

*Mal Gian Chand* (1927) 9 Lah 7 112 I C 29 A I R 19<sup>o</sup>8 Lah 196 (the plaintiffs were in a ring including some of the buyers for artificial inflation of prices)

(b) *Clarke v Tipping* (1846) Beav 284 29<sup>o</sup> 73 R R 355 361

(c) *Wentworth v Lloyd* (1864) 10 H L Cas 589 138 R R 315

(d) *Ex parte Lacey* (180<sup>o</sup>) 6 Ves 6<sup>o</sup> 6 R R 9 11

(e) (19<sup>o</sup>2) 45 Mad 1005 69 I C 927

**216.**—If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Principal's right to benefit gained by agent dealing on his own account in business of agency

*Illustration*

A directs B, his agent, to buy a certain house for him B tells A it cannot be bought, and buys the house for himself A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it

*Additional Illustration*

A, acting as B's agent, agrees with C for the sale to him of fifty maunds of grain for future delivery A delivers his own grain to C as against the contract Subsequently he receives grain from B for delivery to C under the contract, which he sells in the market at a profit B may, on discovering these facts, claim the profit from A [*Damodar Das v Sheoram Das* (1907) 29 All 730]

**Principal's rights to profits.**—"It may be laid down as a general principle that in all cases when a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers ' S A § 211, adopted by the Court of Queen's Bench (f) "If a person, while holding a fiduciary position and acting in that capacity, makes a profit without fully disclosing his interest to those persons towards whom he stands in such a position, he must account to them for that profit ' (g), and it is immaterial that in acquiring the profit the agent may have run the risk of loss (h), and

(f) *Morison v Thompson* (1874) L R 9 Q B 480, 485 There are limits to constructive agency A is a mortgagee in possession holding from Z, the mortgagor, a power of attorney to manage and sell the property M, a subsequent mortgagee with whom A has nothing to do, exercises his power of sale A is not Z's agent for the purpose of that sale and is entitled to become the buyer without being liable to account to Z *Official Assignee v R M P I M Firm* (1929) 7 Rang 61, 118 I C 625, A I R 1929 Rang 140

peculiar rights and duties with the general law of contracting parties is at best remote

(g) *Stirling L J, Costa Ica R Co v Forwood* [1901] I Ch 746 766 In the particular case the plaintiff company was held to have no right to complain of one of its directors having made profit out of a contract with the company, partly because of a special provision in the articles of association and partly because the company was in substance informed of all the material facts

(h) *Williams v Steens* (1866) L R 1 P C 352

But the connection of mortgagees'

that the principal may have suffered no injury (i) Accordingly, if an agent for sale receives a share of commission or extra profit from the buyer's agent without the knowledge of his own principal the principal can recover the sum of money received to his use (j) The principal can also recover from the agent and from the person who bribed him under the name of commission or otherwise jointly and severally, damages for any loss sustained by the principal by reason of entering into the contract e.g. an addition fraudulently made to the price of goods bought through the agent in order to give the agent a secret profit Recovery of the illicit profit from the agent is no bar to an action for further damages against the third person (k) The relation which arises in such cases between the agent in default and the principal is that of debtor and creditor, not of trustee and beneficiary (l) The ordinary law of limitation is applicable, the time running from the principal's discovery of the facts (m) and the special rules as to following trust money into its investments do not apply (l) But interest is recoverable on bribes from the date of their receipt (n)

Where an agent has in effect bought from his principal a subsequent purchaser from the agent with knowledge of the agency is in no better position against the principal than the agent himself (o)

**Forfeiture of commission**—An agent who has wrongfully dealt on his own account is obviously not entitled to recover any commission for the transaction even if the principal adopts it for the principal could forthwith recover it back from him under this section or the equivalent common law rule Moreover he had no authority to make a contract with himself and therefore has earned nothing as agent (p) The principal's option of ratifying the unauthorised transaction does not give the agent any better right

**Knowledge of principal**—A transaction of this kind may be

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| (i) <i>Parker v McKenna</i> (1874) L R 10 Ch 96  | 5 Ex Div 319   |
| (j) <i>Ib</i> note (f) above   | (n) <i>Nant y glo Iron Co v Grate</i> (1878) 12 Ch D 728 <i>Pearson's Case</i> (1877) 5 Ch D v 336                               |
| (k) <i>Mayor of Salford v Lister</i> [1891] 1 Q B 168 C A                                    | (o) <i>Molony v Kernan</i> (1842) 2 Dr & W 31 59 R R 635   |
| (l) <i>Lister &amp; Co v Stubbs</i> (1890) 45 Ch Div 1 <i>Powell v Jones</i> [1905] 1 K B 11 | (p) <i>Salomans v Pender</i> (1865) 3 H & C 639 140 R R 651 <i>Joachinson v Meghjee Vallabhdas</i> (1909) 34 Bom 29 <sup>o</sup> |
| (m) <i>Metropolitan Bank v Heiron</i> (1880)   |  |

approved or ratified by the principal (q), but it must be upon full disclosure. It is not enough for the agent to tell the principal that he has some interest of his own. He must disclose all material facts, and be prepared to show that full information was given and the agreement made with perfect good faith. Notice sufficient to put the principal on inquiry will not do (r). Thus where an agent employed to buy goods sells his own goods to the principal at a price higher than the prevailing market rate, the principal is entitled to repudiate the transaction, and he is not bound by a ratification made in the absence of knowledge that the agent was selling his own goods and was charging him in excess of the market price (s).

It is open to the principal whose agent has bargained for a secret profit or commission to adopt the transaction if he thinks fit, for the purpose of suing the third party and recovering for himself the sum promised by him to the agent, or any part of it which the agent has not received (t).

**Profit not acquired in course of agency.**—There is a decision of the Court of Appeal that an agent who, without disclosure, sells to his principal goods which were the property of the agent before the commencement of the agency is not, in the absence of misrepresentation (u), liable to account for the profit made by him or for the difference between the contract price and the market value, even if the remedy of rescission is not open to the principal owing to its having become impossible (v). This decision, though obviously open to criticism, has been approved by the Judicial Committee of the Privy Council in a case (w) where a director of a company purchased property on his own account, and subsequently sold it to the company at a higher price without disclosing the profit.

**Unauthorised profits of agents**—An agent is liable to refund to the principal the amount of "return commission" received by him from his sub agent (x).

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| <p>(q) <i>Pe Haslam</i> [1902] 1 Ch 765</p> <p>(r) Jessel MR, <i>Dunne v English</i> (1874) L.R. 18 I 1 524 533—536 citing and approving earlier authorities. <i>Glickstein v Barnes</i> [1900] 1 C 240</p> <p>(s) <i>Damodar Das v Steoram Das</i> (1907) 20 All 750</p> <p>(t) <i>Wiley vridge Printing Co v Green</i> (1879) 5 Q B D 109</p> | <p>(u) As to misrepresentation see <i>In re Leads etc., Theatre of Varieties</i> [1902] 2 Ch 509</p> <p>(v) <i>In re Cape Breton Co</i> (1884) 29 Ch Div 795. And see <i>Ladyswell Mining Co v Crookes</i> (1887) 35 Ch Div 400</p> <p>(w) <i>Burland v Earle</i> [1902] A C 83</p> <p>(x) <i>Mayer v Aldon</i> (1892) 16 All 238 267 267 <i>Cp. Lessor v Walsh</i></p> |
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**Payments authorised by custom.**—The law of the present section does not interfere with the customary mode of remunerating an agent, in certain branches of business, by a discount or percentage which is ultimately paid by the third party and not by his own principal. Here the agent's position is almost that of an officer of a market paid by a toll on the goods dealt with. Such allowances are constant in brokerage and insurance business and are so well known that no special consent on the principal's part is needed to cover them. They are included in the agent's general authority to do business in the usual manner. "If a person employs another, who he knows carries on a large business, to do certain work for him, as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging (y). These charges being allowed on a fixed scale to all persons employed in that kind of business alike, and notorious, are not obnoxious to the rule against secret profits and corrupt allowances.

**Agreements against agent's duty void**—An agreement between an agent and a third person which comes within the terms of the present section, or in any way puts the agent's interest in conflict with his duty, is not enforceable unless the principal chooses to ratify it. Where a *mehla* (clerk), without the knowledge of his master, agreed with his master's brokers to receive a percentage, called *sucra*, on the brokerage earned by them in respect of transactions carried out through them by the *mehla's* master, and no express consideration was alleged or proved by the *mehla*, the Court refused to imply as a consideration an agreement by the *mehla* to induce his master to carry on business through those brokers, and was of opinion that such an agreement would be inconsistent with the relation of master and servant. Westropp J said. "To support such an agreement would be against the policy which should regulate the relation of master and servants, and would be

(1843) 4 Dr & W 485, 65 R R 745, a peculiar case of an improvident lease by an agent to a sub agent of the same principals where the agent not being in fact empowered by all the principals,

Sir E. Sugden saw his way to set the lease aside.

(y) *Great Western Insurance Co v Carlisle* (1874) L. R. 9 Ch. 525, 540, *Darby v Saurin* (1876) 3 Ch. D. 502.

subversive of that relation, as such an arrangement would render it the interest of the servant to connive at conduct of the parties with whom his master deals which the servant ought to be vigilant to expose and to check

Could any one contend that the butler of a gentleman here or in London could maintain a suit against a tradesman for a percentage on his master's purchases, supposing an agreement to that effect? It would be against all policy, it would place the servant in a position inconsistent with the duty which he owes to his master" (z)

An agreement whereby the defendant agreed to remunerate an executor appointed under her brother's will out of her own pocket for undertaking the duties of executor, which he declined to do without remuneration, does not create such an interest at variance with the duties imposed upon executors as to render the agreement illegal on the ground of public policy (a) The Court said (b) "It has, however, been strongly contended before us that the present contract is against public policy, because it creates an interest at variance with a duty (see *Egerton v Earl Brownlow*, 4 H L C 1, 250), that is to say, if the plaintiff be remunerated for his services there will be an inducement for him to neglect his duties and to prolong the administration instead of acting with care and diligence We think that there is much force in this contention, but at the same time, although an agreement of this character may appear to some extent for the above reason to be opposed to public policy, we are not prepared to hold that such an agreement is necessarily unlawful We think it should be borne in mind that if a sole executor, or where there is more than one all the executors, renounced, the estate of the testator might go unadministered unless the executor or executors undertook to accept office on receipt of remuneration from a third person, and it is quite possible that more public mischief and inconvenience might be occasioned by the estate remaining unadministered than by rewarding an executor for administering it In the present case it seems to be quite clear upon the evidence that Shajani Kanta would not have taken upon himself the duty of executor unless he was remunerated, and we are not prepared to say that under the circumstances the agreement entered into between him and the Maharani was unlawful"

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(z) *Vinayakrav v Ransordas* (1870) 7 B H C O C 90  
 (a) *Narayan Oomari Deb, v Shajani*  
*Kanta Chatterjee* (1894) 22 Cal 14 cited at pp 162 165 ante  
 (b) 22 Cal pp 20, 21

**217.**—An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent

The right conferred in terms by this section is in the nature of retainer, and assumes the agent to have money for which he is accountable to the principal in his hands or under his control. Sec 221 (pp 618, 619, below) further gives the agent a possessory lien on the principal's property in his custody. Nothing in the Act expressly gives him an equitable lien, *i.e.*, a right to have his claims satisfied in priority to general creditors, out of specific funds of the principal which are not under his control. Such a right, however, may exist in particular cases. In the special case of a solicitor it is well settled that a judgment which he has obtained for his client by his labour or his money should stand, so far as needful, as security for his costs, and he is entitled to have its proceeds pass through his hands. The Court will not allow any collusive arrangement between parties to deprive the solicitor of this benefit (c). But intention to defraud the successful party's solicitor is not presumed from the mere fact of the action being settled without his assistance (d). It seems doubtful, however, whether this rule can properly be regarded as having anything to do with the general law of agency, and therefore whether it can furnish any safe guidance for our present purpose.

Though an agreement entered into between a pleader and his client respecting his remuneration may be void under the provisions of s 28 of the Legal Practitioners Act, 1879, if it is not reduced to writing and filed in court, the pleader does not, by reason of that fact, lose his right under the present section to retain disbursements made by him on his client's behalf out of the sums that may be received by him on account of his client in the case (e).

The language of this section is not very well fitted to cover damages

(c) *Ex parte Morrison* (1868) L. R. 4 Q. B. 153, 156. See *Cullianji Sangjibhoy v. Raghourji, Iyaji* (1906) 30 Bom. 27.

(d) *The Hope* (1883) 8 P. D. 144.

(e) *Subba Pillai v. Ramasami Ayyar* (1903) 27 Mad. 512.

and costs for which the principal may be liable to indemnify the agent under s 222, but it is hardly possible to suppose that it would not be held to do so

**Pakki adat** —A *pakka adatia* is entitled to the charges of remitting to the constituent the profits made by him on the constituent's behalf as an agent is under this section (f)

**Business** —The word "business" in this section means the same business or a continuing business. Hence money received by an agent in one business cannot be retained by him on account of remuneration alleged to be due to him in a different business altogether which had long since been completed (g)

**218.**—Subject to such deductions, the agent is bound

to pay to his principal all sums received on account

Agent's duty to pay sums received for principal

**Mode of payment** —It follows from this rule that an agent to receive money has generally no authority to receive anything else as equivalent. As between the principal and a third person, a set off or balance of account between that person and the agent in his own right is not a good payment to the agent on behalf of the principal. The debtor "must pay in such a manner as to facilitate the agent in transmitting the money to his principal" (h). It seems that an alleged custom to the contrary cannot be sustained. If money is paid to an agent on his principal's account by a person who is also indebted to the agent personally, the agent is not entitled to appropriate the money to his own debt, but must pay it over to the principal (i). Nor is an agent who has received money on the principal's account entitled to set up against the principal claims made by third persons in respect of the money (j).

**Payments in respect of illegal transaction** —If an agent receive money on his principal's behalf under an illegal or void contract, the agent must account to the principal for the money so received and

(f) *Kedarnath Bhuramal v Surajmal Goudram* (1907) 33 Bom 364

(g) *Sardar Muhammad v Babu Das Wadhwa* (1885) Punj Rec no 49

(i) *Pearson v Scott* (1878) 9 Ch D

(j) *Heath v Chilton* (1814) 12 M & W 632 67 R R 44. *Shaw v Pictou* (1825) 4 B & C 715 28 R R 455

(j) *Roberts v Ogilby* (1821) 9 Pri c 269, 23 R R 671

cannot set up the illegality of the contract as a justification for withholding payment, which illegality the other contracting party had waived by paying the money (l). Upon this principle it has been held that an agent receiving cesses from tenants which are illegal under the Bengal Tenancy Act (l), or moneys due to the principal under a wagering contract (m), is bound under the provisions of this section to pay the same to the principal. But this rule does not apply where the contract of agency is itself illegal (n). And it is open to an agent who has received money in respect of a void transaction, or otherwise under such circumstances that he was bound to repay it, to show in an action by the principal that it has been repud to the person from whom it was received (o).

**219.**—In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act, but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

**"Special contract."**—When there is an express contract providing for the remuneration of the agent, the amount of the remuneration and conditions under which it becomes payable must primarily be ascertained from the terms of that contract (p). No other contract inconsistent therewith, whether founded on custom or usage or otherwise, can be implied, but evidence of a particular usage may be given for the purpose of incorporating provisions that are not inconsistent with the terms of the express contract (p). In the absence of an express

(l) *Tenant v Elliot* (1797) 1 B & P 3, 4 R R 755 and see editor's note there, *Bhola Nath v Mul Chand* (1903) 25 All 639, *Palaniappa Chettiar v Chockalingam Chettiar* (1921) 44 Mad 334, 60 I C 127.

(l) *Nagendrabala v Guru Doyal* (1903) 30 Cal 1011.

(m) *Bhola Nath v Mul Chand*, *supra* note (k).

(n) *Sykes v Beadon* (1879) 11 Ch D

170 per Jessel MR., at pp 193 *et seq* where the earlier cases are considered and explained.

(o) *Murray v Mann* (1818) 2 L & 538 76 R R 686. *Shee v Clarkson* (1810) 12 East 507, 11 R R 473. In the former case the contract under which the payment was made was rescinded on the ground of the agent's fraud.

(p) *Green v Mules* (1861) 30 L J C P 343, 126 R R 894 (if it is agreed that

contract, the right to remuneration and conditions under which it is payable are held in English law to depend on the custom or usage of the particular business in which the agent is employed (q) The same principle applies in India (r) The words "special contract" in this section include a contract arising by implication from custom or usage

"Completion of such act."—"The question whether or not an agent is entitled to commission has repeatedly been litigated and it has usually been decided that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him" (s) In other words, the commission becomes due if the broker has induced in the party for whom he acts the contracting mind, the willingness to open negotiations upon a reasonable basis (t) And the right to brokerage is not lost even though a change or modification of the terms of the contract is made between the buyer and seller without the intervention of the broker (u) A broker employed to procure a loan on property becomes entitled to his commission if he finds a party willing to advance the money, even "if the contract were afterwards to go off from the caprice of the lender, or from the infirmity of the title" (v) Whether the other party to the contract ultimately formed has been brought into

commission shall be payable only in the event of success the agent cannot claim a *quantum meruit* in the absence of success) *Citter v Pouell* (1795) 6 T R 320, 3 R R 185, *Hardey v Stuart* (1806) 1 C B N S 88, 107 R R 582, *Fullwood v Akerman* (1862) 11 C B N S 737, 132 R R 735, *Biggs v Gordon* (1860) 8 C B N S 638, 125 R R 824, *Parker v Ibbetson* (1858) 4 C B N S 346 114 R R 752, *Clack v Wood* (1882) 9 Q B D 276 *Ayyannath Chetty v Subramania Iyer* (1923) 45 Mad L J 409, 76 I C 756 (brokerage payable if title approved)

(q) *Read v Rann* (1830) 10 B & C 438, 34 R R 473 *Eroad v Thomas* (1830) 7 Bing 99, 33 R R 399 (custom of City of London by which shipbrokers entitled to commission only in the event of completion of contracts negotiated by them held to exclude any claim even for

*quantum meruit* in respect of a contract not completed though the non completion was owing to the act of the principal) *Baring v Stanton* (1876) 3 Ch D 502

(r) *Satchidananda Dutt v Arista Nath Miller* (1923) 50 Cal 878, 79 I C 287

(s) Per Erle C J in *Green v Bartlett* (1863) 14 C B N S 681, 135 R R 868

(t) *Municipal Corporation of Bombay v Cutvery Hirs*, (1895) 20 Bom 124

(u) *Willinson v Martin* (1837) 8 C & P 1, *Mansell v Clements* (1874) L R 9 C P 139, *Lara v Hill* (1863) 15 C B N S 45, 137 R R 377, where the only disputed matter was the construction of special terms

(v) *Green v Lucas* (1878) 31 L T 731, on appeal 33 L T 684, *Fisher v Drewitt* (1878-9) 48 L J Ex 32, *Elias v Gervind* (1902) 30 Cal 202 These two English cases add nothing to the law, which was already settled

relation with the principal by means of the agent's intervention is a question of fact. It is not necessary to establish his claim that he should have been the other party's first or sole source of information (*w*). But in order to establish a claim for commission the agent must show that the transaction in respect of which the claim is made was a direct result of his agency (*x*). It is not sufficient to show that the transaction would not have been entered into but for his introduction. He must go further, and show that his introduction was the direct cause of the transaction (*y*).

**Agent prevented from earning remuneration**—If, in breach of a contract, express or implied, with an agent, the principal, by refusing to complete a transaction or otherwise prevents the agent from earning remuneration the agent is entitled to damages (*z*), and in such case the measure of damages where the agent has done all that he undertook to do, is the full amount of remuneration that he would have earned if the transaction had been duly completed, or the principal had otherwise carried out his contract (*a*). Where the authority of an agent is revoked after it has been partly exercised or after the agent has attempted to exercise it the question whether he is entitled to a *quantum meruit* for the work previously done depends upon the terms of the contract of agency, and the custom or usage of the particular trade or business (*b*).

**Express contract for remuneration**—Where the terms of remuneration are contained in a writing the agent is not entitled to remuneration unless all conditions imposed by the writing have been fulfilled (*c*).

(*w*) *Mansell v Clements* (1874) L R 9 C P 139 *Jordon v Ram Chandra Gupta* (1904) 8 C W N 831 *Cassumbhai* (1922) 24 Bom L R 847 75 I C 193 A I R 1922 Bom 433

(*x*) *Bray v Chandler* (1856) 18 C B 718 107 R R 419 *Gibson v Crick* (1862) 1 H & C 142 130 R R 425 *Tribe v Taylor* (1876) 1 C P D 505 *Antrobus v Wickens* (1865) 4 F & F 291 142 R R 690

(*y*) *Tribe v Taylor* last note (*a*) *Prickett v Badger* (1856) 1 C B N S 296 107 R R 668 *Roberts v Barnard* (1884) 1 C & E 336

(*b*) *Queen of Spain v Parr* (1868) 39 L J Ch 73 *Simpson v Lamb* (1856) 17 C B 603 104 R R 806 The agent must show that there was a contract express or implied, to pay remuneration in such a case. The burden of proof is on him.

(*c*) *Lalljee Mahomed v Dadabhai* (1916) 23 Cal L J 190 195, 34 I C 807

transit (c). But where possession is obtained from the agent by fraud (a), or is obtained unlawfully and without his consent (b), his lien is not affected by the loss of possession. And if possession is given to a bailee for safe custody, or for some other purpose consistent with the continuance of the lien, and the circumstances are such as to show that the agent intends to retain his rights, the lien will not be prejudiced by his parting with the possession (c). The lien of an agent is not affected by an order winding up the company whose agent he is. Therefore where the agent is in possession of property belonging to the company by virtue of his lien he cannot be required to deliver up possession to the official liquidator (d).

An agent's lien is extinguished by his entering into any agreement (e), or acting in any character (f), inconsistent with its continuance; and may be waived by conduct indicating an intention to abandon it (g). Whether the taking of other security for the claim secured by the lien operates as a waiver depends upon whether, having regard to the nature of the security, the position of the parties and all the other circumstances of the particular case, an intention to abandon the lien may be inferred (h).

The lien of an agent is not affected by the circumstance that the remedy for recovery of the debt or claim secured thereby becomes barred by the Statutes of Limitation (i), or that the principal becomes

(c) *Sweet v Pym* (1870) 1 East, 4, 5 R. R. 497, *Halting v Loring* (1873) L. R. 17 Eq. 92.

(d) *Wallace v Woodgate* (1824) R. & M. 193.

(e) *Ducas v. Stickle* (1835) 7 C. & P. 387, 48 R. R. 325; *In re Carter* (1886) 55 L. J. Ch. 230.

(f) *North Western Bank v. Poynter* [1895] A. C. 56; *Watson v Lyon* (1855) 7 D. & G. M. & G. 285, 109 R. R. 122.

(g) *Chidambaram Chettiar v. Tinnerelly Sugar Mills Co., Ltd.* (1915) 31 Mad. 123.

(h) *Forth v. Simpson* (1849) 13 Q. B. 680, 75 R. R. 493, *Hart v. Kitchner* (1857) 11 Moo. P. C. 21, 117 R. R. 10, *The Panther* (1885) 5 App. M. C. 479.

(i) *In re Nicholson* (1883) 53 L. J. Ch. 722, *In re Mason* (1871) 10 Ch. D. 729 (agent acting for mortgagor and mort-

gagor loses his lien on title deeds for costs due from mortgagor). *In re Laurence* (1894) 1 Ch. 556.

(j) *Jacob v. Latour* (1825) 5 Benc. 170, *Werks v. Goode* (1850) 6 C. B. N. S. 377.

(k) *In re Taylor* [1891] 1 Ch. 507; *Groom v. Cheswright* [1895] 1 Ch. 739, *In re Douglas* [1898] 1 Ch. 199 (a solicitor taking a security for costs must be deemed to waive his lien, unless he expressly reserves it, because it is his duty, if he intends to retain the lien, to inform the client that such is his intention). *Cowell v. Simpson* (1890) 16 Ves. 275, 10 R. R. 181, *Angus v. MacLachlan* (1881) 23 Ch. D. 537, *Tennant v. Simpson* (1865) L. R. 1 C. P. 363.

(l) *Sydney v. Hewitt* (1795) 3 Esp. 21, 6 R. R. 114, *Carter v. M'Intosh* (1880) 42 Ch. D. 424.

bankrupt or insolvent (j), nor by any dealing by the principal with the property subject to the lien (l), after the lien has attached

### *Principal's Duty to Agent*

222.—The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Agent to be indemnified against consequences of lawful acts

#### *Illustrations*

(a) B, at Singapore, under instructions from A, of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorises him to defend the suit. B defends the suit, and is compelled to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

(b) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

[ For *there, s e*, Calcutta," in illustration (b), we should probably read Singapore." Whitley Stokes's note, referring to s 230. Or it must be assumed that in some other way B has made himself personally liable on the contract.]

**Limits of agent's indemnity.**—"If an agent has, *without his own default*, incurred losses or damages in the course of transacting the business of his agency or in following the instructions of his principal, he will be entitled to full compensation therefor. But it is not every loss or damage for which the agent will be entitled to reimbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency" (l).

"The case of *Duncan v Hill* (m) is a direct authority that there is no implied promise by a buying principal to his broker that he will indemnify him from the consequences of his own wrong (n), such as

(j) *Pobson v Kemp* (1802) 4 Esp 233, 8 R R 631, *The Cella* (1888) 13 P Div 82, *Ex parte Beall* (1883) 24 Ch Div 408.

(l) *West of England Bank v Batchelor* (1882) 51 L J Ch 199, *Godin v London Assurance Co* (1758) 1 W Bl 103.

(l) S 4 § 33J, cited *arguendo* in

*Duncan v Hill*, L R 8 Ex at p. 244.

(m) (1873) L R 8 Ex 242.

(n) *Ellis v Pond* [1898] 1 Q B 426, 441. As to death or insolvency of the principal justifying an immediate sale by a broker who has bought on the principal's account with his own money

insolvency (o) [or negligence] (p) or having sold at a loss in breach of his agreement with the principal " (q)

The right of indemnity extends to losses or liabilities incurred in the exercise of the authority according to the rules and customs of the particular trade or market in which the agent is authorised to deal, provided the rule or custom in question is a reasonable one (r), or the principal had notice of it at the time when he conferred the authority (s), but if the rule or custom is unlawful or unreasonable, and was unknown to the principal, he is under no liability to indemnify the agent against the consequences of acting on it (t)

Ratification by the principal will cure the agent's default and restore his ordinary right to indemnity (u)

The present group of sections must be taken as supplementing, not as restricting, the rights of an agent under the general law regulating contracts of indemnity, for which see the commentary on ss 124, 125 above

Costs of defending action — Illustration (b) corresponds with an English decision, but omits the fact, there treated as material, that the agent was found by the verdict of the jury to have done what a prudent and reasonable man would have done in his own case (v) Perhaps it may be thought that this condition is sufficiently implied in the text A similar condition is expressed in s 195 (p 579, above)

see *Lacey v Hill* (1873) L R 8 Ch 921, as to the broker taking over shares that are practically unmarketable *Re Finlay* [1913] 1 Ch 565 C A

(o) (1873) L R 8 Ex 242

(p) *Levis v Samuel* (1846) 8 Q B 685, 70 R R 582

(q) *Ellis v Pond*, note (n), above

(r) *Davis v Howard* (1890) 24 Q B D 691, *Young v Cole* (1837) 3 Bing. N C 724, 43 R R 783, *Biederman v Stone* (1867) L R 2 C P 504 These were all cases of rules and usages of the Stock Exchange but the principle is of general application *Ex parte Bishop* (1880) 15 Ch Div 400 (guarantee given by bill broker according to usage)

(s) *Seymour v Bridge* (1835) 14 Q B D 460

(t) *Perry v Barnett* (1885) 15 Q B Div 388 (custom to disregard the provisions of an Act of Parliament) *Westropp v Solomon* (1849) 8 C B 345, 79 R R 530, seems anomalous as compared with the authorities for the general rule, and not easy to bring within any recognised exception, if indeed it is consistent with *Sheffield Corporation v Barclay* [1907] A C 392 We do not think it a practical authority in England at this day, or of any value in India

(u) *Hartas v Ribbons* (1839) 22 Q B Div 204

(v) *Broom v Hall* (1859) 7 C B N S 503, 121 R R 614 And see *Frazzette v Tagliaferro* (1855) 10 Moo P C 175 110 R R 21

**"Lawful"**—A wagering contract is void, not unlawful (see s 30). When therefore a suit is brought by a betting agent against his principal to recover a loss on betting paid by the agent, the principal cannot escape liability on the ground that the agent's act was *unlawful* (w). See notes to s 30 under the head "Agreements collateral to wagering contracts," p 240, above.

**C.i.f. contract with commission agent**—Though under an ordinary c.i.f. contract between sellers and buyers, the tender of a bill of lading after the contract of affreightment has been dissolved by the outbreak of war is not such a tender as the buyers are bound to accept, such a tender is a good tender when goods are ordered through a commission agent "on account and at the risk of" the principal and the principal is bound to accept the tender and pay for the goods. "To throw these goods on the agent's hands and leave them to bear the loss which has arisen by reason of the outbreak of war while the goods were in transit appears to be entirely opposed to, and inconsistent with, the general principles of the law of agency" (x).

**223.**—Where one person employs another to do an act and the agent does the act in good faith the employer is liable to indemnify the agent against the consequences of that act though it cause an injury to the rights of third persons.

*Illustrations*

(a) A a decree holder and entitled to execution of B's goods requires the officer of the Court to seize certain goods representing them to be the goods of B. The officer seizes the goods and is sued by C the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C in consequence of obeying A's directions.

(b) B at the request of A sells goods in the possession of A but which A had no right to dispose of. B does not know this and hands over the proceeds of the sale to A. Afterwards C the true owner of the goods sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay C and for B's own expenses.

Illustration (a) seems to have been suggested by the observations of the Court of Exchequer Chamber on similar facts. A judgment

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(w) *Behari Lal v Parbhu Lal* (1908) 14 Mad L J 326  
 Punj Rec no 79, *Shibho Mal v Lachman Das* (1901) 23 All 165, *Chekka v*  
*Gajjala* (1904) 14 Mad L J 326  
 (x) *Harry Meredith v Abdulla Sahib* (1918) 41 Mad 1060, 49 I C 196

creditor who requires an officer of the law to take specified goods, pointing them out as the goods of the debtor, makes that officer his agent, and must indemnify him if, acting in good faith, he commits a trespass in obeying the instructions (y)

**Unlawful acts**—The preceding section deals with indemnity against the consequences of lawful acts, this section with the consequences of unlawful acts done in good faith. It is clearly settled that an agent cannot claim indemnity in respect of acts which he knows to be unlawful, even if they are not criminal, whether on an express or implied promise (z). Any such promise is void as being contrary to public policy.

**224.**—Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Non liability of employer of agent to do a criminal act

*Illustrations*

(a) A employs B to beat C and agrees to indemnify him against all consequences of the act. B thereupon beats C and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B the proprietor of a newspaper publishes at A's request a libel upon C in the paper and A agrees to indemnify B against the consequences of the publication and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages and also incurs expenses. A is not liable to B upon the indemnity.

The rule in the text is elementary. Illustration (b) seems to assume that every libel for which damages can be recovered is also a crime, or, in other words, that defamation as defined in the Indian Penal Code includes all the cases in which a civil action for injurious words is maintainable in British India. We are not aware of any authority for such an assumption. An indemnity against damages for libel is now a common clause in agreements with publishers in England,

(y) *Collins v Evans* (1814) 5 Q B 800 829 830 61 R R 656 663

(z) Illegal insurance *Allins v Jupe* (1877) 2 C P D 375. Illegal payment *In re Parker* (1882) 21 Ch Div 408. Purchase of smuggled goods *Ex parte Mather* (1797) 3 Ves 373. *Bells v Gibbins*

(1831) 2 A & E 57, 41 P R 381. On this and the following section cp *Mad vjs Thauer v Jar Hussain Hyder Dast* (1925) 88 I C 980 where the only question was whether there was any illegality at all.

and we have not heard of any one suggesting that such a term is invalid as being against public policy. Probably the true construction of the section is that it only applies where the act is criminal on the part of the agent, which in most cases would amount to the same thing as saying that it must be criminal to his knowledge. The rule could hardly be held to apply to a crime committed by means of an innocent agent.

225.—The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

*Illustration*

A employs B as a bricklayer in building a house and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B.

This, as a general rule, needs no proof or illustration. But the agent may be disentitled to relief if the injury was due to his own contributory negligence. This subject belongs to the law of civil wrongs, the English law must be sought in works on the law of torts or in monographs on negligence, of which the late Mr Thomas Beven's is the most learned and complete. It cannot be usefully discussed or stated here. The same remark applies to the defence of "common employment," which, however, is not applicable to cases where the negligence is the employer's own. Sections on these matters were in the original draft of the Indian Law Commissioners, but were omitted at a later stage, presumably as not being appropriate in a Contract Act. For the modern law of workmen's compensation, see Act VIII of 1923.

An agent is not, generally speaking, entitled to sue the principal on any contract made on his behalf, even if the agent is personally liable on the contract to the third party. If a merchant resident abroad employs an agent to buy goods, and the agent buys them and gives his own acceptance for the price, he cannot sue the principal as for goods sold, because the contract between them is not one of buying and selling, but of agency (a). Similarly, if a broker buys goods on behalf of an undisclosed principal he cannot sue the principal for non accept

ance of the goods (b), or for goods bargained and sold (c) His only remedy is an action for indemnity under s 222 (p 623, above) There is an exception to this rule in the case of policy brokers, who, by custom, are entitled to sue their principals for premiums due under policies effected on their behalf, though the brokers may not have paid the premiums not settled with the underwriters in respect thereof (d)

### *Effect of agency on contracts with third persons*

**226.**—Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person

Enforcement  
and consequences  
of agents con-  
tracts

#### *Illustrations*

(a) A buys goods from B knowing that he is an agent for their sale but not knowing who is the principal B a principal is the person entitled to claim from A the price of the goods and A cannot in a suit by the principal set off against that claim a debt due to himself from B

(b) A being B's agent with authority to receive money on his behalf receives from C a sum of money due to B C is discharged of his obligation to pay the sum in question to B

This section assumes that the contract or act of the agent is one which, as between the principal and third persons, is binding on the principal If the contract is entered into or act done professedly on behalf of the principal, and is within the scope of the actual authority of the agent, there is no difficulty It is immaterial in such a case what may be the motive of the agent The principal is bound though the contract may be entered into or act done fraudulently in furtherance of the agent's own interests, and contrary to the interests of the principal, provided the person dealing with the agent acts in good faith (e) This

(b) *Telley v Shand* (1872) 25 L T 58

(c) *White v Benclendorff* (1873) 29 L T 475

(d) *Power v Butcher* (1829) 5 M & R 327, 34 R R 432

(e) *Hambro v Burnand* (1904) 2 K B 10, where authority was given to underwrite policies of insurance in the name of the principal according to the ordinary course of business at Lloyd's and the

agent, in fraud of the principal underwrote certain guarantee policies In this case the authority was in writing but there does not appear to be any distinction in the application of the principle between a written and a verbal authority See also *Faisal Allah v East Indian Railway Co* (1931) 43 All 623 64 I O 863 A I R 1922 All 324

does not depend on the principle of estoppel, and it is immaterial whether the third person has any knowledge of the existence or extent of the agent's actual authority or not (*f*). With regard to contracts and acts which are not actually authorised, the principal may be bound by them, on the principle of estoppel, if they are within the scope of the agent's ostensible authority; but in no case is he bound by any unauthorised act or transaction with respect to persons having notice that the actual authority is being exceeded. This subject is dealt with by s. 237 (p. 655, below) and the commentary thereon (*g*).

The expression "contract" includes a promissory note. A. authorises B. to execute a promissory note on his behalf in favour of C. B. executes the note by putting a mark described in the note as "nishani (mark) of A." A is bound by the note (*h*).

This section does not touch the conditions under which the agent can sue or be sued on the contract in his own name, as to which see ss. 230—231, pp. 631—652, below. The principal must be able to show that the third party dealt with the agent as such (*i*).

**227.**—When an agent does more than he is authorised to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

*Illustration.*

A, being owner of a ship and cargo, authorises B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

"The principal is not bound by the unauthorised acts of his agent, but is bound where the authority is pursued, or so far as it is distinctly pursued": S. A. § 170. This and the following section must be read subject to s. 237 (below, p. 655).

(*f*) See last note.

(*g*) See also s. 178 as to pledge by mercantile agent and s. 178A as to pledge by person in possession under voidable contract, pp. 548—555, below.

(*h*) *Challa Balayya v. Kanuparth* (1917) 40 Mad 1171, 44 I C 813

(*i*) *Sims v Bond* (1833) 5 B & Ad 389, 39 R R. 511

**228.**—Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction

Principal not bound when excess of agent's authority is not separable

#### Illustration

A authorises B to buy 500 sheep for him B buys 500 sheep and 200 lambs for one sum of 6,000 rupees A may repudiate the whole transaction

The law declared in this and the preceding section is concisely illustrated by an English case where B, an insurance broker at Liverpool, was authorised by A to underwrite policies of marine insurance in his name and on his behalf, the risk not to exceed £100 by any one vessel B underwrote a policy for Z, without A's authority or knowledge, for £150 Z did not know what the limits of B's authority were, but it was well known in Liverpool that a broker's authority was almost invariably limited, though the limit of the authorised amount in each case was not disclosed The Court held that A was not liable for the insurance of £150 which he had not authorised, and the contract could not be divided so as to make him liable for £100 (j) The only argument to the contrary was that in the circumstances B must be regarded as a general agent whose powers could not be limited by any private instructions

Further illustrations are supplied by Indian cases A authorises B to draw bills to the extent of Rs 200 each B draws bills in the name of A for Rs 1,000 each A may repudiate the whole transaction (k)

A instructs B to enter into a contract for the delivery of cotton at the end of January B enters into a contract for delivery by the middle of that month A is not bound by the contract, and any custom of the market allowing B to deviate from A's instructions will not be enforced by the Court (l)

(j) *Baines v Lwing* (1866) L R 1 Ex 320 The law is the same if the agent is authorised to raise not less than a certain sum on the security of documents of title and does raise less *Fry v Smellie* [1912]

3 K B 282, C A

(k) *Premabhai v Brown* (1873) 10 P H C 319

(l) *Irlapa Nayak v Varsa Keshary* (1871) 8 B H C A C 19

229.—Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

#### Illustrations

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

[In illustration (b) it must be understood as the fact was in the corresponding English case mentioned below, that C is D's factor selling in his own name, and there is no question of fraud.]

The rule laid down in this section is intended to declare a general principle of law. "It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or, in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings" (m).

But by the terms of the present section, which are cited in the same judgment, the application of the principle is limited by the condition that the agent's knowledge must have been obtained "in the course of the business transacted by him for the principal" (n). This is further enforced by illustration (b), which appears to be taken from a decision of the Court of Common Pleas in 1863. Here the general rule was laid down as being "that whatever an agent does within the scope of his employment, and whatever information comes to him in the course of his employment, as agent, binds his principal" (o). This limitation, however, was rejected by the Court of Exchequer Chamber, which

(m) Judgment of Judicial Committee 34 I A 179, 184

in *Rampal Singh v Balbhaddar Singh* (1902) 25 All 1, 17, L R 29 I A 203

(n) See *Chabildas Lallobhai v Dayal Mevra*, (1907) 31 Bom. 566, 591, L R

(o) *Dresser v Norwood* (1863) 14 C B N S 574, 587, per Erle C.J. Willes J and Keating J delivered judgments to the same effect.

unanimously reversed the decision of the Common Pleas, and held that the buyer was not entitled to set off a debt due to him from the factor "We think," the Court (p) said, "that in a commercial transaction of this description, where the agent of the buyer purchases on behalf of his principal goods of the factor of the seller, the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal." Thus the law of British India on this point follows the reversed decision of the Court of Common Pleas. It may have been a deliberate preference, or it may be permissible to conjecture that the section was originally drafted in 1864 or 1865, before the report of the case in the Exchequer Chamber was published, and that report was afterwards overlooked. Probably the difference is seldom of practical importance, but it seems inconvenient that such a difference should exist between English and Indian law without very strong reasons.

The following are illustrations from the English authorities of the rule stated in the section. An agent of an insurance company having negotiated a contract with a man who had lost the sight of an eye, it was held that the agent's knowledge of the fact must be imputed to the company, and that it could not avoid the contract on the ground of non disclosure thereof by the assured (q). A ship sustained damage in the course of a voyage, and the master subsequently wrote a letter to the owner, but did not mention the fact of the damage. It was held that the master ought to have communicated the fact, and, the owner having insured the ship after receipt of the letter, that the insurance was void on the ground of non disclosure (r). When the knowledge of an agent is imputed to the principal, the principal is considered to have notice as from the time when he would have received notice if the agent had performed his duty and communicated with him with reasonable diligence (s).

(p) Pollock C B, Crompton J, Bramwell B, Channell B, Blackburn J, and Shree J. S C in Ex Ch 1864 17 C B N S 466, 481. This is contrary to Story's opinion (S A § 140), but is accepted by his later editors and in American decisions to which they refer.

(q) *Baarden v. London, etc., Assurance*

*Co* [1892] 2 Q B 531

(r) *Gladstone v. King* (1813) 1 M & S 35, 14 R R 392. And see *Falherbert v. Mather* (1785) 1 T R 12, 1 R R 131.

(s) *Proudfoot v. Montefiore* (1867) L R 2 Q B 511, where it was held under the particular circumstances that the agent ought to have telegraphed.



fact that an agent has an interest in concealing facts from his principal is not sufficient to prevent his knowledge of those facts from being imputed to the principal, if it is his duty to communicate them (y) Where, however, the person seeking to charge the principal with notice was aware that the agent intended to conceal his knowledge, such knowledge will not be imputed to the principal (z)

It is to be observed that notice through an agent is not the same thing as constructive notice and should not be confused with it The agent's knowledge is imputed to the principal without regard to any question of what the principal in person knew or might have known Such is not the nature of constructive notice A man is said to have constructive notice of that which he is treated as having known because, though not proved to have actually known it, he might and ought to have known it with reasonably diligent use of the means of knowledge at his disposal Now an agent's constructive as well as his actual notice may be imputed to the principal in any transaction where constructive notice has to be considered at all (a) On the whole, then, a man may have notice either by himself or by his agent, and that notice may be either actual or (in an appropriate case) constructive

Agent cannot personally enforce, nor be bound by contracts on behalf of principal

**230.**—In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them

Such a contract shall be presumed to exist in the following cases —

Presumption of contract to contrary

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad,
- (2) where the agent does not disclose the name of his principal,
- (3) where the principal, though disclosed, cannot be sued

(j) *Pollard v Hart* (1871) L R 6 Ch 678  
*Bradley v Riches* (1878) 9 Ch D 180  
*Dixon v Hinch* last note

constructive notice do not apply to commercial transactions see per Lindley LJ in *Manchester Trust v Furness* [1895] 2 Q B 639 645

( ) *Sharpe v Foj* (1868) 17 W R 65  
 (a) That the equitable refinements of

**Principle of the rule and exceptions**—The test question in cases within the principle of this section is always to whom credit was given by the other party, or, if that cannot be proved as a fact, to whom it may reasonably be presumed to have been given. Thus, in the cases here specially mentioned, the party cannot be supposed to rely exclusively on a foreign principal whom, by general mercantile usage, the agent's contract is not understood to bind, or on a person whose name he does not know, and whose standing and credit he therefore cannot verify, or on a person or body who, for whatever reason, is on the face of the transaction not legally liable. For the general rule it is needless to multiply authorities. "Ordinarily an agent contracting in the name of his principal and not in his own name is not entitled to sue, nor can he be sued, on such contracts." "When in making a contract no credit is given to himself as agent, but credit is exclusively given to his principal, he is not personally liable thereon." S. A. §§ 261, 263, 271, 391. The rule applies although the agent knows that the contract is one that he has no authority to make on behalf of the principal, and makes it fraudulently. Even in that case he cannot be sued on the contract if it is professedly made by him merely in his capacity as agent (*b*).

**Contract to the contrary**—Whether an agent, apart from the cases specially mentioned, is to be taken to have contracted personally, or merely on behalf of the principal, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances (*c*). In the case of oral contracts the question is purely one of fact (*d*). If the contract is in writing, the presumed intention is that which appears from the terms of the written agreement as a whole (*e*). Where, in an agreement to grant a lease, the agent was described as making it on behalf of the principal, but in a subsequent portion of the document it was provided that he (the agent) would execute the lease, it was held

(*b*) *Lewis v. Ascholson* (1852) 18 Q. B. 503, 88 R. R. 683, *Jenkins v. Hutchinson* (1849) 13 Q. B. 744, 78 R. R. 500. But he may be sued for compensation under s. 235, or in an action of deceit.

(*c*) See Bowstead on Agency 7th ed. pp. 388 seq.

(*d*) *Lakeman v. Mountstephen* (1874)

L. R. 7 H. L. 17. *Jones v. Littledale* (1837) 1 N. & P. 677, 45 R. R. 542, *Long v. Millar* (1879) 4 C. P. Div. 650, *Williamson v. Barton* (1862) 7 H. & N. 899, 176 R. R. 751.

(*e*) *Sputtle v. Lavender* (1821) 5 Moo. 270 C. P., 23 R. R. 508.

that he had contracted personally although the premises belonged to the principal (f) A contract in the following form "We the undersigned, three of the directors, agree to repay 500*l* advanced to the company," was held to be a personal contract on the part of the directors (g) On the other hand, a contract in the terms "I undertake on behalf of A (the principal) to pay, etc.," signed by the agent, was held not to involve personal liability (h) A broker selling expressly on account of a known principal will not be liable to him for the price, although the buyer is undisclosed and described in the sold note as "my principal" (i)

An agent who signs a contract in his own name without qualification, though known to be an agent, is understood to contract personally, unless a contrary intention plainly appears from the body of the instrument (j), and the mere description of him as an agent, whether as part of the signature or in the body of the contract, is not sufficient indication of a contrary intention to discharge him from the liability incurred by reason of the unqualified signature (k) On the other hand, if words are added to the signature indicating that he signs "as an agent," or on account or behalf of the principal, he is considered not to contract personally, unless it plainly appears from the body of the contract, notwithstanding the qualified signature, that he intended to make himself a party (l) The authorities in support and illustration of these rules of construction are very numerous (m), but the rules are well established, and the case in the House of Lords which we shall immediately cite has probably superseded several of the earlier judgments Where an agent signed a charter party in his own name without qualification he was held personally liable, although he was de

(f) *Norton v Herron* (1825) 1 C & P 648, 28 R R 797 And see *Tanner v Christian* (1855) 4 E & B 591, 99 R R 637

(g) *McCullin v Oulpin* (1891) 6 Q B D 516

(h) *Downman v Williams* (1845) 7 Q B 103, 68 R R 413 Cp *Iveson v Comington* (1823) 1 B & C 160, 25 R R 311

(i) *Southwell v Bowditch* (1876) 1 C P Div 574

(j) *Higgins v Senior* (1841) 8 M & W

834, 58 R R 884, *Fairlie v Fenton* (1870) L R 5 Ex 169, *Culder v Dobell* (1871) L R 6 C P 486, *Dutton v Marsh* (1871) L R 6 C P 361

(k) *Hough v Manzanos* (1879) 4 Lx D 104, *Hutchison v Eaton* (1884) 13 Q B Div 861

(l) *Deslandes v Gregory* (1860) 30 L J Q B 36, *Redpath v Hogg* (1860) L R 1 Ex 335

(m) See Bowstead on Agency, 7th ed., pp 396 seq

scribed as an agent for named principals (n). A similar decision was given in a case where the agent was described in a body of the contract as "consignee and agent on behalf of" his principal, naming him (o). On the other hand, the words "on account of" (p) or "on behalf of" (q) a named principal in the body of the contract are sufficient to exclude personal liability, notwithstanding an unqualified signature, and words of description in the body of the instrument, such as "charterer," which might make the agent personally liable without a clear qualification of the signature, will not counteract such a qualification (r).

Oral evidence of intention is not admissible for the purpose of discharging an agent from liability on a written contract, from the terms of which he appears to have intended to contract personally (s), although it has been held in England that he is entitled, by way of equitable defence, to prove an express oral agreement that, having regard to his being merely an agent, he should not be sued on such a contract (t). But where the terms of the written contract are such as not to import a personal liability on the part of the agent, oral evidence may be given to show that by the custom of the particular trade an agent so contracting is personally liable, either absolutely or conditionally (u), provided the custom is not inconsistent with the express written terms (v).

Thus where a firm of brokers entered into a contract "for principals" for the sale of gunny and hessian, oral evidence was allowed to

(n) *Parker v Winlow* (1857) 7 E & B 942

(o) *Kennedy v Gouveia* (1823) 3 D & R 503, 26 R R 616

(p) *Gadd v Houghton* (1876) 1 Ex Div 357, C A, disapproving *Paice v Walker* (1870) L R 5 Ex 173, where the words were "as agent for" a named principal

(q) *Ogden v Hall* (1879) 40 L T 751

(r) *Lennard v Robinson* (1855) 5 E & B 125, is overruled, and *Gadd v Houghton* (note (c) above) approved. *Universal Steam Navigation Co v James McKelvie & Co* [1923] A C 492. The contract, including the terms of the signature, is to be construed as a whole, see Lord Sumner's opinion.

(s) *Higgins v Senior* (1841) 8 M & W

834 58 R R 884, *Holding v Elliott* (1860) 5 H & N 117, 120 R R 504

(t) *Wake v Harrop* (1862) 1 H & C 202, 130 R R 461, affg 6 H & N 768

(u) See *Pike v Ongley* (1887) 18 Q B D 708, citing and summarising former decisions. Such a custom may make the agent liable as well as the principal but would be bad if it purported to make him exclusively liable. The existence of any such custom is of course a question of fact, cp [1923] A C 496

(v) *Barrow v Dyster* (1884) 13 Q B D 635, where a clause providing that the agents (brokers) should act as arbitrators in the event of dispute was held inconsistent with a custom making them personally liable

show that by custom of the trade in gunny and hessian in Calcutta brokers were personally liable both to buyers and (w) sellers

**Agency coupled with interest**—It is also settled law that when an agent "has made a contract in the subject matter of which he has a special property he may, even though he contracted for an avowed principal, sue in his own name" (x) Such is the case of a factor (y), and of an auctioneer, who "has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or a shopman," and a special property by reason of his lien (z) Conversely the auctioneer may be liable to the buyer for neglect to deliver the goods (a) or to an outstanding true owner for conversion (b), and if the sale has been advertised as being without reserve, the auctioneer is deemed to impliedly contract to accept the offer of the highest *bona fide* bidder and is liable to him in damages if he accepts a bid from the vendor (c)

The like rule is laid down by Indian Courts "Where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name" (d) This is not a real exception to the rule laid down at the beginning of the section, the agent being in such a case virtually a principal to the extent of his interest in the contract

Whenever an agent has entered into contract in such terms as to be personally liable he has a corresponding right to sue thereon (e), and this right is not affected by his principal's renunciation of the contract (f) Policy brokers also are entitled by custom to sue in their own names on all policies effected by them (g) But the mere fact that

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- |   |  |
|---|--|
| (u) <i>Joy Lall &amp; Co v Monmotha Nath</i>    | 24 Mad 130                                   |
| (1916) 20 C W N 365, 35 I C 3                   | (e) <i>Cooke v Wilson</i> (1856) 1 C B       |
| (x) 2 Sm L C 378 (13th ed)                      | N S 153, <i>Agacio v Forbes</i> (1861) 14    |
| (y) <i>Snee v Prescott</i> (1743) 1 Atk 248     | Moo P C 160, <i>Robertson v Watt</i> (1853)  |
| <i>Fisher v Marsh</i> (1865) 6 B & S 411        | 8 Lx 299 91 R R 497                          |
| (-) <i>Williams v Millington</i> (1788) 1       | (f) <i>Stort v Spackman</i> (1831) 2 B &     |
| H Bl 81 2 R R 724                               | Ad 962 (broker who had bought goods          |
| (a) <i>Woolfe v Horne</i> (1877) 2 Q B D 355    | in his own name held entitled to recover     |
| (b) <i>Consolidated Co v Curtis &amp; Son</i>   | damages for non delivery, though the         |
| [1892] 1 Q B 495 The material part of           | principal with the broker's acquiescence     |
| the judgment in <i>Williams v Millington</i> is | had renounced the contract)                  |
| quoted at p 499                                 | (g) <i>Provincial Insurance Co v LeLue</i>   |
| (c) <i>Harlow v Harrison</i> (1858) 1 F &       | (1874) 1 R 6 P C 221 <i>Oom v Bruce</i>      |
| F 295 309 117 R R 219 227,                      | (1810) 12 Lx 225 11 R R 367                  |
| <i>Healley v Newton</i> (1881) 19 Ch Div 326    | <i>Kentington v Inglis</i> (1807) 8 East 273 |
| (d) <i>Subrahmanya v Varayanan</i> (1900)       | 9 R R 139                                    |

an agent is acting under a *del credere* commission does not give him the right to personally enforce a contract which he is not otherwise entitled to enforce (*h*).

**Right of agent to sue for money paid by mistake, etc.**—An agent may in his own name sue for the recovery of money paid on his principal's behalf under a mistake of fact, or in respect of a consideration which fails, or in consequence of the fraud or other wrongful act of the payee, or otherwise under circumstances rendering the payee liable to repay the money (*i*)

**Presumed exceptions : Foreign principal.**—This is based on convenience and general mercantile usage. In the case of a British merchant buying for a foreigner, "according to the universal understanding of merchants and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner" (*j*); for "a foreign constituent does not give the commission merchant any authority to pledge his credit to those" with whom the commissioner deals on his account (*k*). Here, unless a contrary agreement appears, the foreign principal is not a party to the contract at all, and can neither sue (*l*) nor be sued (*m*) on it. The question was originally one of fact (*k*), but at this day doubts in particular cases are reducible to a question whether, on the construction of the contract with regard to the facts, there does appear an intention that the principal shall be a party (*m*). On the question whether an agent is to be considered as having contracted personally the true intention has to be deduced as in other cases, from the terms of the contract and surrounding circumstances. The circumstances that the principal is a foreigner gives rise to a presumption, but only a presumption, of an intention to contract personally, and the presumption may be rebutted by indication of an intention to the contrary (*n*). Where an agent was described as con-

(*h*) *Bramuell v Spiller* (1870) 21 L T 672

(*i*) *Steuenson v Mortimer* (1778) Cowp 805; *Holt v. Ely* (1853) 1 E & B 795, 93 R R 398, *Colonial Bank v Exchange Bank* (1885) 11 App Cas 84

(*j*) *Thomson v Darnport* (1829) 9 B & C. at p 87; 32 R. R. at p 585

(*k*) *Armstrong v. Stokes* (1872) L R 7 Q B 598, 605, *Cur*, per Blackburn J.

(*l*) *Elbinger Actien Gesellschaft v Claye*

(1873) L R 8 Q B 473

(*m*) *Hutton v Bulloch* (1874) L R 9 Q B 572

(*n*) See the authorities critically reviewed in *Miller, Gibb & Co v Smith & Tyren* [1917] 2 K B 141, C A, where some doubt was thrown on the continuing validity of the usage under modern conditions, at all events it is excluded when the terms of the contract make the foreign principal liable

tracting "on behalf of" a foreign principal, who was named, it was held that the agent was not personally liable though he signed the contract in his own name (o), and a similar decision was come to where the contract note described the agents as having sold "on account of" certain foreign principals (p), and where signature "as agents" was combined with description of the principal parties as "seller" and "buyer" (q)

A company having its registered office in England, but carrying on business in India, will be deemed to be resident in England for the purposes of this section. Where a contract, therefore, is entered into by the "managing agents" of such company in India, it can be enforced against the agents personally, unless the foreign company is in writing made the contracting party, and the contract is made directly in its name (r)

**Principal undisclosed.**—The rule under this head is so well settled that it will suffice to refer to recent Indian cases without going back here to the ultimate authorities. The qualifications expressed in the following sections to s 234 inclusive are now the part of the doctrine requiring most attention. The decisions establishing them contain ample proof of the rule. The same principles are followed in Indian Courts. The honorary secretary, therefore, of a school alleged to have been maintained by an association in London is personally liable for the rent of a house hired by him in his name for the purposes of the school (s). But if the other party knows that the agent is contracting as such, the presumption laid down in this clause does not arise, although at the time of making the contract the agent does not disclose the name of the principal, the knowledge being in such a case equivalent to disclosure (t). Thus the secretary of a club cannot be sued personally for work done for the club, unless he has pledged his personal credit (u). And similarly he cannot sue a member on behalf of the club for goods supplied to him (v). But the presumption that an agent

(o) *Ogden v Hall* (1879) 40 L T 751  
(p) *Gadd v Houghton* (1876) 1 Ex Div 357, C A

(q) Note (n) above  
(r) *Tutika Basavaraju v Parry & Co* (1903) 27 Mad 315

(s) *Bhojabhai v Hayem Samuel* (1898) 22 Bom 754

(t) *Mackinnon v Lang* (1881) 6 Bom

584

(u) *North Western Provinces Club v Sadullah* (1898) 20 All 407, *Kanwar Pau or v Hebbert* (1891) Punj Rec no 15

(v) *Michael v Briggs* (1890) 14 Mad 362. It is needless to refer to the authorities which settled the law in England

is personally bound by a contract when the name of the principal is not disclosed may be rebutted, and where the contract is in writing, the whole of the contract is for that purpose to be examined (w) The mere fact, however, that the agent has signed himself as such will not rebut the presumption of personal liability (x) But if the agent appears, on the face of the written contract, to be liable personally, he will not be allowed to adduce oral evidence to show that he did not contract in his personal capacity (y)

Where the usual presumption is negatived by an agent contracting for an unnamed principal in such terms as to exclude his own liability, he may nevertheless show afterwards, if the fact be so, that he is himself the principal ( ), or the other party on discovering that fact may sue him (a)

Where an ancestral business is carried on by some only of the members of a joint Hindu family as managers, a contract made by the managers in their own name may be enforced by them personally without joining the other members as parties to the suit The managing members are in such a case in the position of undisclosed partners (b)

A merchant in this country who orders goods through a firm of commission agents in Europe cannot hold the firm liable for failure to deliver the goods The firm is in such a case merely an agent to place the merchant's order with the manufacturers in Europe, and by so doing it does not enter into any contract with the merchant for sale on behalf of the manufacturers, and it cannot therefore be held liable as an agent acting on behalf of undisclosed principals The section refers to contracts "entered into by him on behalf of his principal," and the placing of the order does not amount to such a contract The result is

(w) *Soopromonian Setty v Heilgers* (1879) 5 Cal 71, *Mackinnon v Lang* (1881) 5 Bom 584, *Hasonbhoy v Clapham* (1882) 7 Bom 51, 65, *Deo v Narajan*, 116 I C 669 A I R 1929 Nag 170 (merely on facts)

(x) *Gubhoy v Atetoom* (1890) 17 Cal 449 See *Later v Gordon* (1872) 7 M H C 82 84 and *cp Hough v Manzanov* note (k) p 606 above In the case of negotiable instruments however, it would seem that no presumption of the agent's personal liability could arise at all

if he signs his name to the instrument as agent Negotiable Instruments Act 1881, s 28 *Op Mackinnon v Lang* (1881) 5 Bom 584 588 and pp 636, 637 above

(y) *Soopromonian Setty v Heilgers* (1879) 5 Cal 71, 79 See Evidence Act, 1872 s 92

(z) *Schmaltz v Avery* (1851) 16 Q B 655 but see s 236 p 654 below

(a) *Carr v Jackson* (1852) 7 Ex 382

(b) *Gopal Das v Hari Das* (1905) 27 All 361

the same if the goods are ordered through a branch in this country of a firm of commission agents in another country (c)

A broker is an agent primarily to establish privity of contract between two parties. A broker when he closes a negotiation as the common agent of both parties usually enters it in his business book and gives to each party a note of the transaction which as given to the seller is the sold note and as given to the buyer the bought note. *Prima facie* a broker is employed to find a buyer or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to the position of broker, his contract is one of employment between him and the person who employs him and not a contract of purchase or sale with the party whom he in the course of such employment finds. A broker may, however, make himself a party to the contract of sale or purchase, for he can go beyond his position of a negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. Where he is merely an intermediary, he is not liable on the contract, but if he has entered into a contract of purchase or sale on behalf of his principal, the provisions of this section will apply (d). Thus if the principal is undisclosed and the note says "sold for you to my principals," i.e. "I, your broker have made a contract for my principals, the buyers the broker is merely an intermediary and he is not personally liable to his employer (e). For the same reason he is not liable if the contract says "bought for you from my principals" (f), and the terms "sold by order and for account of G to selves for principal" the broker signing as broker, do not bind him personally, nor therefore entitle him to sue in his own name for failure to deliver (g). But the broker is personally liable if the contract says "bought of you for my

(c) *Mahomedally v Schiller* (1859) 13 Bom 470. The order to the defendants in this case was in the following form: "I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below. The defendants' reply was that they had received an intimation from their home firm that the order had been placed. See also *The Bombay United Merchants Co Ltd v Dowlatabhai* (1888) 12 Bom 500.

(d) *Patiram v Kanlanarra Co Ltd* (1915) 42 Cal 1050 1065-66 31 I C 607.

(e) *Southwell v Bonitch* (1876) 1 R 1 C P D 374.

(f) *Patiram v Kanlanarra Co Ltd* (1915) 42 Cal 1050 31 I C 607.

(g) *Nanda Lal Roy v Gurupalsingh* (1924) 51 Cal 588 81 I C 221 A 1 R 1934 Cal 733. *Sentile* a usage of the local market to treat brokers as principals is not a misapprehension.

principals," for here the contract is one of purchase by the broker on behalf of undisclosed principals (h).

**Principal not liable.**—There is a rather curious class of cases in which agreements have been entered into by promoters on behalf of companies intended to be, but in fact not yet, incorporated. In such a case the alleged principal has no legal existence, and the agent is held to have contracted on his own account in order that there may not be a total failure of remedy (i). Other cases have occurred where the principals were uncertain bodies of persons, or otherwise incapable of being sued by the description in the contract; but these would hardly be instructive in the different circumstances of Indian society (j), and it must be remembered that decisions turning on or involving the 'solemnity' of an English deed are to be used here with great caution.

**Deed executed in agent's name.**—According to English law, no person who is not a party to a deed can be sued upon the contract contained in it. But it seems that the technical rule of English law has no operation in this country, so that the principal may sue and be sued upon a deed even though it may not have been executed in his name (k).

**Sovereign States as principals.**—Sovereign States and their rulers would seem to come within the description of possible principals who cannot be sued, but there is a special rule for this case and it is settled, for sufficient reasons of good sense and policy that an agent contracting even in his own name on behalf of a Government is not to be considered as personally a party to the contract. No man would accept public office at such risk as a different rule would involve (l). As regards

(h) *Southwell v Bowditch* (1876) L. R. 1 C P D 374, at p 379

(i) *Kelner v Baxter* (1866) L. R. 2 C P 174. *Re Empress Engineering Co* (1880) 16 Ch Div 125. *Lakshmishankar v Motiram* (1904) 6 Bom L R 1106

(j) In *Furnicall v Coombes* (1943) 5 M. & Cr 736, 63 R. R. 435, an express term that a covenant should not bind the covenantors personally was held to be inoperative because no one else could be bound, followed, *Watling v Lewis* [1911] 1 Ch. 414

(k) *Chinnaramanuja v Padmanabha* (1896) 19 Mad 471, dissenting from *Ragoonathdas v Morari* (1892) 16 Bom 568. The opinion of the Madras Court is evidently preferable on grounds of convenience

(l) *Gudley v Lord Palmerston* (1822) 3 Brod. & B 275, 24 R. R. 668 see this and other authorities collected in *Palmer v Hutchinson* (1891) 6 App Ca at p 626, *Grant v Secretary of State for India* (1877) 2 C P D at p 461

the same if the goods are ordered through a branch in this country of a firm of commission agents in another country (c)

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(e) *Sothwell v Bouditch* (1876) 1 I C P D 374.

(f) *Palitana v Kanakanarra Co Ltd* (1915) 42 Cal 1050 31 I C 607.

(g) *Vanda Lal Roy v Gurupada Baidya* (1924) 51 Cal 589 81 I C 721 A I R 1924 Cal 733. *Scoble* a usage of the local market to treat the broker as principal is not a [mis]ile.

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(i) *Kelner v Baxter* (1866) 1 R. C. P. 174, *The Empress Engineering Co.* (1880) 16 Ch. Div. 12; *Lakshminankar v Motiram* (1904) 6 Bom. I. R. 1106.

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British India the law is that a foreign or native ruler may be sued in a competent Court in India in certain cases with the consent of the Governor General in Council. Where no such consent is given, it has been held that a suit may be brought against the agent appointed by the native ruler for the purposes of the business in respect of which the suit is brought (m)

**Negotiable instruments.**—Where a negotiable instrument is signed by a duly authorised agent in the name of his principal, the latter may be rendered liable on the instrument (n). But where the instrument is signed by the agent in his own name without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, he is liable personally except to those who induced him to sign upon the belief that the principal only would be held liable (o). The question may arise whether a principal whose name does not appear on a negotiable instrument can be made liable on the instrument as a party thereto. In England it is provided by the Bills of Exchange Act that the principal is not liable in such a case (p). There is no specific provision in the Negotiable Instruments Act, and it is a question whether, having regard to ss 233 and 234 (pp 650, 651 below), the principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name (q). In the case of a joint Hindu family, it has been held that the payee may sue not only the maker, but his coparceners, provided the plaint includes a demand in respect of the original debt, and the debt was contracted for the benefit of the family (r). But the liability of the other coparceners in such a case does not rest on any principles of agency, but upon the personal law to which the parties are subject (s).

**Defendant's right where agent sues in own name**—Where an agent sues in his own name on a contract made on the principal's behalf,

(m) *Abdul Ali v Goldstein* (1910) Punj Rec no 43 41 C 902

(n) Negotiable Instruments Act 1881 s 27

(o) *Ib*, s 28

(p) S 23. Bills and notes form an exception to the ordinary rule that when a contract is made by an agent in his own

name evidence is admissible to charge the undisclosed principal though not to discharge the agent. Chalmers thereon, at p 77

(q) *Krishna v Krishnavamsi* (1900) 23 Mad 197 600

(r) *Ib*

(s) *Ib*, pp 604 607

statements made by the principal, as well as his own statements, may be used in evidence against him as admissions (t), and the defendant is entitled to avail himself of any defence, including that of set-off, which would have been available against the agent if he had been suing on a contract made on his own behalf, even though the defence would not have been available in an action by the principal on the contract (u). The defendant is also entitled to discovery to the same extent as if the principal were a party to the proceedings (v).

**Effect of settlement with principal.**—As a general rule, the right of an agent to sue personally on a contract made on the principal's behalf ceases on the intervention of the principal, and a settlement between the principal and the third party constitutes a good defence to an action by the agent (w). But if the agent has a lien on the subject matter of the contract as against the principal, his right to sue has priority to the right of the principal as long as the claim secured by the lien remains unsatisfied (x), and in such a case the defendant cannot in an action by the agent set up any settlement with or set-off against the principal which would operate to the prejudice of the claim secured by the lien (y), unless the agent is estopped by his conduct, or by the terms of the contract, from disputing the validity of the settlement or right of set-off (z).

(t) *Smith v Lyon* (1813) 3 Camp 465, 14 R R 810

(u) *Gibson v Winter* (1833) 5 B & Ad 96, 39 R R 411 (in an action by a policy broker, a payment by way of set off was held a good defence, though it would not have been a good payment as against the principal)

(v) *Hillis v Baddeley* [1892] 2 Q B 324

(w) *Atkinson v Cotesworth* (1825) 3 B & C 647, 27 R R 450 *Rogers v Hadley* (1863) 2 H & C 227, 133 R R 652

(x) *Drinkwater v Goodwin* (1775) Cowp 251 (sale by factor in his own name of goods on which he had a lien for advances)

(y) *Atkyns v Amber* (1796) 2 Esp 493 (defendant not entitled, in action by broker for price of goods sold in own

name on which he had made advances, to set off debt due from principal), *Robinson v Rutter* (1855) 4 E & B 954, 99 R R 840 (action by auctioneer for price of goods sold plea that defendant had paid the principal held bad), *Grice v Kenrick* (1870) L R 5 Q B 340 (action by auctioneer for price of goods sold settlement with the principal which did not operate to the prejudice of the plaintiff held a good defence)

(z) *Coppin v Waller* (1816) 2 Marsh 497, 17 R R 505, *Coppin v Craig* (1816) 2 Marsh 501, 17 R R 503 (in these cases an auctioneer, having sold goods which were described as the property of a named principal, allowed purchasers to take the goods away without giving them notice not to pay the principal)

**231.**—If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract, but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

“**Discloses himself.**”—The High Court of Bombay is of opinion that the right of the third party to repudiate the contract under the second paragraph arises only where the principal himself makes the disclosure, and that it does not arise where the disclosure is made by some other person or the information reaches him from some other source (a) The principle of this section is further developed in the special rules as to undisclosed or dormant partners, in such cases the real difficulty is often to know whether the acting partner was in fact acting on behalf of the firm See on s 251 below

**232.**—Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract

*Illustration*

A, who owes 500 rupees to B, sells 1,000 rupees worth of rice to B A is acting as agent for C in the transaction but B has no knowledge nor reason

(a) *Lakshmandas v Lane* (1904) 32 Bom 356, the reference to *Karim Chowkidar v Sinalar Bawa* (1896) 24 Cal 207, at l 3 of p 302 of the report is wrong. the correct reference should be *Grenon v Lachmi Narain* (1896) 24 Cal 8, at p 10, *Kapurji Magniram v Panaji Deschand*, 53 Bom 110, 113 I C 741, A I R 1929 Bom 177

able ground of suspicion that such is the case C cannot compel B to take the rice without allowing him to set off A's debt

**Rights of undisclosed principal**—Like previous learned commentators on these two sections, we are at a loss to discover any difference between them, except that s 231 expresses the same matter more fully. There is a clause very like s 232 in the Indian Law Commissioners' draft, but nothing corresponding to s 231. We are inclined to conjecture that s 231 was an amendment intended to replace the section as first drawn, and that finally both clauses were retained either by inadvertence or by way of abundant caution. The difficulty thus raised is not serious, for there is no doubt about the substance of the law, but it has been judicially discussed. In *Premji v Madhooji* (b) Marriott J said "I do not think s 232 is a repetition of the first paragraph of s 231. It is, I think, a qualification of the first portion of that paragraph which gives a principal a general right to enforce a contract entered into by his agent. Sec 232 qualifies that general right by making it subject to the rights and obligations subsisting between the agent and the other contracting party. It is submitted, however that the ground is completely covered by the saving clause in the first paragraph of s 231 and no further qualification is added by s 232. The illustration to s 232 would have been quite as appropriate to s 231. In the case now cited it was contended that the object of s 232 was to reproduce the law as supposed to be laid down in *Thomson v Davenport* (c) and *Armstrong v Stokes* (d) namely, that the right of the other contracting party to hold the principal liable is subject to the qualification that the principal has not paid the agent or that the state of accounts between the principal and agent has not been altered to the prejudice of the principal. But this contention did not prevail, and it was said that the only qualification imposed upon the rights of the other contracting party was that specified in s 234. Almost at the same time, in fact, the Court of Appeal in England (e) overruling, or refusing to accept literally, the wider dicta in *Thomson v Davenport* and *Armstrong v Stokes* (f) approved the more guarded judgment of Parke B

(b) (1880) 4 Bom 447, 456

414 417

(c) (1829) 9 B & C 78 32 R R 578  
and in 2 Sm L C

(f) See foregoing notes. The authority of *Armstrong v Stokes* is reduced to that of a decision on special circumstances

(d) (1872) L R 7 Q B 508

(e) *Irvine v Watson* (1880) 5 Q B Div

and the Court of Exchequer in *Heald v Kenworthy* (g) "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal It would be unjust (h) for him to do so But I think that there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position" Otherwise, "if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt, and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly"

On similar grounds, if the principal represents the agent as principal he is bound by that representation So if he stands by and allows a third person innocently to treat with the agent as principal he cannot afterwards turn round and sue him in his own name (i)

The result is that these two sections and s 234, taken together fairly represent modern English law as understood in the Court of Appeal

**Equities between agent and third party**—An undisclosed principal coming in to sue on the contract made by the agent must take the contract, as the phrase goes, subject to all equities, that is the third party may use against the principal any defence that would have availed him against the agent (j) "Where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification, that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal, and consequently he is to have the same right of set-off which he would have had against the agent" (k) "The law

(g) (1855) 10 Ex 739, 746, 102 R R 800 805

(h) Referring to some of the language used in *Thomson v Davenport*

(i) *Ferrand v Bischoffsheim* (1858) 4 C B N S 710 717 114 R R 908 913

The decision shows that nothing less than positive misleading will do

(j) *George v Clagett* (1797) 7 T R 379 4 R R 462, *Sims v Bond* (1833) 5 B & Ad 389 393, 39 R R 511, 515

(k) *Willer J* 14 C B N S at p 580

with respect to the right of set-off by a third person dealing with a factor who sells goods in his own name and afterwards becomes bankrupt is well established by *George v Clagett* (l) That rule is founded on principles of common honesty One who satisfies his contract with the person with whom he has contracted ought not to suffer by reason of its afterwards turning out that there was a concealed principal " (m)

The application of the rule is limited to liquidated demands (n) , but it " is not confined to the sale of goods If A employs B as his agent to make any contract for him, or to receive money for him, and B makes a contract with C or employs C as his agent, if B is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by C to be acting as an agent for any one A cannot make a demand against C without the latter being entitled to stand in the same position as if B had in fact been a principal If A has allowed his agent B to appear in the character of a principal he must take the consequences ' (o)

In England it is not necessary for the third party who dealt with the agent as a principal to go beyond showing that he believed him to be a principal Means of knowledge or ' reason to suspect ' appears to be material only as tending to negative the alleged belief (p) The words of both ss 231 and 232, however, are quite clear on this point But there must be actual belief that one is dealing with a principal Ignorance or doubt whether the apparent principal is a principal or an agent is not enough for the ground of the rule is that the agent has been allowed by his undisclosed principal to hold out himself as the principal, and the third party has dealt with him as such (q)

The second paragraph of s 231 is really a branch of the general rule that agreements involving personal considerations of skill, confidence, or the like are not assignable or transferable

(l) Note (j) above

(m) *Turner v Thomas* (1871) L R 6 C P 610 613 per Willes J

(n) *Ib*

(o) *Montagu v Forwood* [1893] 2 Q B 350 355 per Bowen LJ Here the defendants were employed by apparent principals who were in fact agents for the

plaintiffs to collect a general average contribution from underwriters

(p) *Borries v Imperial Ottoman Bank* (1873) L R 9 C P 38

(q) *Coole v Escheltj* (1887) 12 App Ca 271 The decision has been criticised, but being in the House of Lords is final

Right of person  
dealing with agent  
personally liable

**233.**—In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable.

*Illustration.*

A enters into a contract with B to sell him 100 bales of cotton and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

**In cases where the agent is personally liable.**—As to the cases where an agent is personally liable, see s. 230 and commentary thereon, p. 634 above.

**Creditor's election.**—A person who has made a contract with an agent may, if and when he pleases, look directly to the principal, unless by the terms of the contract he has agreed not to do so, and that whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only, and not the less so in cases where the agent is personally liable, for the law which superadds the liability of the agent does not detract from the liability of the principal (r). A company is, therefore, liable for moneys advanced in the course of voluntary liquidation to the liquidator authorised by the company to borrow for the purposes of the winding up (s). And, upon the same principle, a loan made to the secretary, treasurer, and agent of a company authorised to raise moneys for the company may be recovered from the company (t). But when once the creditor has elected to sue the agent, and sued him to judgment, he cannot afterwards bring a second action against the principal, though the judgment against the agent may not have been satisfied (u), and though the creditor was not aware of the existence of a principal when he sued the agent (v). But where the suit against the agent is dismissed the creditor may subsequently bring a fresh suit against the principal, the

(r) *Calder v. Dobell* (1871) L. R. 6 C. P. 480. The question was whether the circumstances showed an election to charge the agent exclusively.

(s) *In re Ganges Steam Car Co.* (1891) 18 Cal. 31.

(t) *Purmanundass v. Cormack* (1881) 6 Bom. 326.

(u) *Shital Motilal v. Birdichand* (1917) 104

19 Bom. L. R. 370, 40 I. C. 104. *Bir Bhaddar v. Sarju Prasad* (1887) 9 All. 681. *Priestly v. Fernie* (1865) 3 H. & C. 977. and see L. R. 6 C. P. at p. 409, and *Morel v. Westmoreland* [1904] A. C. 11. *French v. Houie* [1906] 2 K. B. 674.

(v) *Shital Motilal v. Birdichand* (1917) 10 Bom. L. R. 370, 380-381, 40 I. C.

reason being that nothing short of a judgment against the agent could amount to a binding election on the part of the creditor to abandon the right to proceed against the principal (w). In short, the liability is, as in English law, not joint but alternative (x)

There may, however, be a deliberate intention shown from the beginning of the transaction, or at some later stage, to give credit to the agent alone in that case there is no right of action against the principal (y), and the third party must elect to sue an undisclosed principal, if he means to preserve his rights against him, within a reasonable time after ascertaining him (z). Except where the agent has been sued to judgment, the question whether the creditor has elected to give credit to him to the exclusion of the principal is one of fact (a) Invoicing the goods to the agent and calling upon him to pay for them (a), or taking and renewing his acceptances in payment of the price (b), are not conclusive of such an election, nor are any legal proceedings short of suing the agent to judgment (c) The next section is apparently intended to cover all forms of election whether by estoppel or otherwise

**234.**—When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively

(w) *Raman v Iyavatan* (1883) 7 Mad 392, citing *Curtis v Williamson* (1874) L R 10 Q B 57

(x) Notwithstanding the rather loose language of the illustration *Kutti Krishnan Nair v Appa Nair* (1926) 49 Mad 900 97 I C 475 A I R 1926 Mad 1213 As to the addition of undisclosed principals to a suit brought against the agent, see *Lackman Das v Bhagirath* 90 I C 487, A I R 1926 Oudh 41

(y) *Paterson v Gandasequi* (1812) 15 East 62, *Addison v Gandasequi* (1812)

4 Taunt 574 13 R R 368, 680 and in 2 Sm L C

(z) *Smethurst v Mitchell* (1859) 1 E & E 622, 117 R R 374 *Cp David son v Donaldson* (1882) 9 Q B D 623

(a) *Calder v Dobell* (1871) L R 6 C P 486

(b) *Robinson v Read* (1829) 9 B & C 449, *Whitwell v Perrin* (1858) 4 C B N S 412, 114 R R 785

(c) *Curtis v Williamson* (1874) L R 10 Q B 57 *Morgan v Couchman* (1853) 14 C B 100, 98 R R 555

This section seems to be derived from S A § 291, rather than from any definite English authority. We may take it, however, as giving the true reason of a rule which, about the time when the Act was passed, was too widely laid down in England, but was afterwards corrected in the Court of Appeal (see the commentary n ss 231, 232, pp 646 seq above)

**235.**—A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing

**Implied warranty of authority.**—This section is in accordance with the English law as established by *Collen v Wright* (d). It applies not only to the case of a person who represents that he has authority from another when he has no authority whatever, but to the case of a person who represents that he has a certain authority from another when he has authority of another description (e). The duty is grounded on an implied warranty by the agent that he has authority, and the action, being in contract, lies even if the agent honestly believed he had authority, and against executors (in which case an action in tort for deceit does not lie in England). The doctrine has been fully confirmed by later authorities and by the House of Lords (f). An agent who purports to report the other party's intentions does not thereby make himself that party's agent to deal with his original principal. It may be a breach of his original duty as agent if his report is incorrect, but he is not liable under the rule in *Collen v Wright* on an implied warranty of authority from the other party to conclude the transaction (g).

The word "untruly" may perhaps imply (as is held in England) that the representation must be of matter of fact (h).

(d) (1857) 7 L & B 301, in Ex Ch 8 E & B 647, 110 R R 602, 611, see *Hasonbhoy v Clapham* (1882) 7 Bom 51, 66

(e) *Ganpat Prasad v Saryu* (1911) 9 All L J 8 131 C 94

(f) *Starkey v Bank of England* [1903] A C 114. It is needless for Indian purposes to cite intermediate cases

(g) *Chr Saltesen & Co v Feders Aktiebolaget Nordgerman* [1907] A C 302

(h) *Beattie v Lord Ebury* (1872) 1 R 7 H L 102, *Weeks v Property* (1873) L R 8 C P 427, *Shet Manibhai v Bai Rupalika* (1899) 24 Bom 166, 170. As to the distinction between representations of fact and of law, see p 123, above

A public servant acting on behalf of the Government is not deemed to warrant his authority any more than to make himself personally liable on the contract (i), and for the same reason of policy

If a man goes through the form of contracting as an agent, but warns the other party that he has at the time no authority, he is obviously not liable under this section (j) It seems a nice question whether there is in such a case anything which the named principal can ratify, or anything more than an offer to him, liable to revocation like any ordinary proposal

**Representation must be effective**—The liability of a pretended agent under this section does not arise, unless the representation that he is the agent of another is false and also induces the person to whom the representation is made to deal with him as such agent A representation by the defendant to the plaintiff that she is the duly authorised agent of her minor son does not render her liable under this section if the plaintiff knows that the son is a minor For a minor cannot appoint an agent (s 183, p 559, above) and consequently no warranty such as would support a suit could arise out of such a representation (k)

**Measure of Damages**—In England the action being founded on contract, and not on tort, the measure of damages is the loss sustained as the consequence of the breach of the implied warranty In other words, the person acting on the misrepresentation is entitled not only to recover any loss actually sustained through being misled but also any profit which he would have gained if the representation had been true (l) Thus, if an agent contracts, without authority to buy goods at a price in excess of their value and the principal repudiates the contract as unauthorised the measure of damages recoverable against the agent is the difference between the contract price and the market value of the goods (m) Similarly where an agent who was instructed to apply for shares in a certain company, applied for shares in another company by mistake, and they were allotted to the principal who

(i) *Dunn v Macdonald* [1897] 1 Q B 555 C A (1871) L R 6 Q B 26 *Meek v Wendt* (1888) 21 Q B D 126 *Godwin v Francis* (1870) L R 5 C P 295 is a case

(j) *Halbot v Lens* [1901] 1 Ch 344

(k) *Shet Manibhai v Bai Rupaliba* (1879) 24 Bom 166 citing *Beattie v Lord* 16 r J L R Ch 777 L R 7 H L 102 where the damages claimed were held to be too remote

(l) *Firbank v Humphreys* (1886) 18 Q B Div 54, *Richardson v Williamson* (1857) 7 E & B 568 110 R R 730

(m) *Simons v Patchett* (1857) 7 E & B 568 110 R R 730

repudiated them shortly afterwards in the winding up of the company, it was held that, the principal being solvent and the shares valueless, the measure of damages payable by the agent to the liquidator was the full amount payable on the shares (n) If the third person reasonably (o) takes proceedings against the principal for the enforcement of the unauthorised transaction, the damages recoverable against the agent include the costs and expenses incurred by the third person in respect of the proceedings (p)

It is open to question whether in India the compensation recoverable under the section will be assessed on the same principle The language used seems more appropriate to an action in the nature of an action of deceit than to one founded on a warranty (q)

**Limitation.**—It has been held by the High Court of Madras that a suit for damages against a person for untruly representing himself to be the agent of another is governed by art 115 of Sch I of the Limitation Act (r)

**236.**—A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account

English authorities make a distinction in this matter between contracts on behalf of a named principal and those in which the principal is not named In the former case the agent cannot substitute himself for the principal (s), though the other party may by words or by conduct, such as acting on the contract after knowledge that the nominal agent was the real principal, deprive himself of the right to object, and it has been suggested, though not decided that the agent might be allowed to take up the contract for himself on condition of being subject to all defences available against either himself or the

(n) *Ex parte Panmure* (1893) 24 Ch Div 367

(o) *See Pow v Davis* (1861) 1 B & S 220, 124 R R 530

(p) *Spedding v Neill* (1861) 1 L R 4 C P 212, *Hughes v Greame* (1864) 77 L J Q B 335

(q) *See Iyengar Chettiar v Aricha Chettiar* (1915) 38 Mad 275, 278, 21

1 C 65

(r) *Iyengar Chettiar v Aricha Chettiar* (1915) 38 Mad 275 21 1 C 65

(s) *Buckerton v Hurrell* (1816) 5 M & S 383

named principal (*t*). But where the principal is not named the third party is contracting with the principal, whoever he may be, and there is no obvious reason why he should be presumed willing to deal with any unknown person in the world, provided that he is capable of being sued, and unwilling to deal with the nominal agent, the only person he knows in the matter. Accordingly a person who made a charter-party as agent for an unnamed freighter has been allowed to show that he was the freighter himself (*u*).

It does not seem possible, however, to read any such distinction into the perfectly general language of the present section; and, indeed, the English rule is not clear of doubt, as the authorities (including some dicta which it would be useless to cite here) are not uniform, and the rule has never been settled by a Court of appeal. The High Court of Calcutta has held that this section is not restricted to cases where an agent purports to act for a named principal (*v*). If a person professing to act as an agent for an undisclosed principal enters into a contract with another, and there is no undisclosed principal in fact, the present section at once applies, and he cannot sue on the contract (*w*).

Conversely, where a man has contracted in writing in terms importing that he is the sole principal, *e.g.*, made a charter-party "as owner of the ship A.," another person cannot be allowed to sue on the contract as an undisclosed principal (*x*).

### 237.—When an agent has, without authority, done acts

or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons

Liability of principal inducing belief that agent's unauthorized acts were authorised

to believe that such acts and obligations were within the scope of the agent's authority.

(*t*) *Rayner v. Grote* (1846) 15 M & W. 359; 71 R. R. 709.

(*u*) *Schmaltz v. Atery* (1851) 16 Q. B. 655; 83 R. R. 653.

(*v*) *Seidull Roy Maskara v. Nahapiet* (1907) 34 Cal. 628; *Nanda Lal Roy v. Gurnpada Haldar* (1924) 51 Cal. 588; 81 I. C. 721.

Cal. 802; 17 I. C. 973.

(*x*) *Humble v Hunter* (1848) 12 Q. B. 310, 76 R. R. 291. But this does not extend to the term "charterer," which is consistent with agency for an undisclosed principal. *Rederi Aktienbolaget Transatlantisk v. Fred Drughorn* [1918] 1 K. B. 394, C. A., affirmed in H. L. [1919] A. C. 203.

(*w*) *Ramji Das v. Janki Das* (1912) 39

orders of his principal to a *bona fide* holder without notice the principal cannot reclaim them' (h) It must be understood in the illustration that the instruments are not handed to B merely for safe custody

The Privy Council case of *Ram Pentab v Marshall* (i) which however was not decided with reference to the section affords an additional illustration In that case the principal was held liable upon a contract entered into by his agent in excess of his authority the evidence showing that the contracting party might honestly and reasonably have believed in the existence of the authority to the extent apparent to him

The same principle is applied in the class of cases where it is held that persons dealing with incorporated companies though they must take notice at their peril of disabilities imposed on the corporation by its special Act of Parliament memorandum or other public document of constitution are entitled to assume that the directors or managers are duly exercising their authority according to the company's internal regulations But this subject is much too special to be pursued in a commentary like the present (j)

**Notice of excess of authority**—No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that the act is unauthorised This proposition is so obvious that it would be superfluous to cite authorities several of which relate to dealings with money and negotiable instruments (k) in support of it One case however where the notice was only constructive may be mentioned An agent who was appointed by a power of attorney borrowed money on the faith of a representation by him that the power gave him full authority to borrow and misapplied it The agent produced the power which did not authorise the loan but the lender did not read it and made the advance in reliance on the agent's representation It was held that the lender must be taken to have had notice of the terms of the power and that the principal was not bound by the loan (l)

(h) See *London Joint Stock Bank v* All 781  
*Shannon* (18) 1 A C 201 *Goodrich* v (j) See *London Joint Stock Bank v*  
*London* (18 C) 1 App Cas 477 *London* v (k) See *London Joint Stock Bank v*  
 (i) See *London Joint Stock Bank v* (l) See *London Joint Stock Bank v*  
*London* (18 C) 1 App Cas 477 *London* v (m) See *London Joint Stock Bank v*  
 All 781 (n) See *London Joint Stock Bank v* (o) See *London Joint Stock Bank v*

“On behalf of his principal.”—A principal is not bound by any act done by his agent which he has not in fact authorised, unless it is done in the course of the agent’s employment on his behalf (m) and is within the scope of the agent’s apparent authority (n)

**238.**—Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals, but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals

#### Illustrations

(a) A being B’s agent for the sale of goods induces C to buy them by a misrepresentation which he was not authorised by B to make. The contract is voidable as between B and C at the option of C

(b) A, the captain of B’s ship signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor

**Course of employment**—The accordance of this section with the modern common law is well shown in a judgment delivered in the Judicial Committee by Lord Lindley. The law upon this subject cannot be better expressed than it was by the acting Chief Justice [of New South Wales] in this case. He said. Although the particular act which gives the cause of action may not be authorised still if the act is done in the course of employment which is authorised then the master is liable for the act of his servant. This doctrine has been approved and acted upon by this Board in *Mackay v Commercial Bank*

(11) *McGovern v Dyer* (1873) 1 R 8 Q B 141 where the managing director of a company obtained payment of a private debt out of certain funds in breach of an understanding between the debtor (who was also indebted to the company) and a surety for his debt to the company and it was held in an action by the company against the surety, that the company was not responsible for the conduct of the managing director

in the matter

(n) For illustration see Bowstead on Agency 7th ed pp 27-284. For an Indian one *Morariji Premji v Mulji Ranchhodji & Co* (1923) 48 Bom 207 77 I C 266. A I R 1924 Bom 232 of which the practical moral is that cheques to bearer are not safe even if crossed. The rule is too well recognised to need authorities in support

of *New Brunswick (o) Swire v Francis (p)* and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick v English Joint Stock Bank (q)* which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth v City of Glasgow Bank (r)* and has been followed in numerous other cases (s).

In the passage here referred to as now the leading authority Willes J. delivering the judgment of the Exchequer Chamber said

With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit though no express command or privity of the master be proved (t). That principle is acted upon every day in running down cases. It has been applied also [in various cases of trespass, false imprisonment by servants of corporations acting in supposed execution of their duties under by laws and the like]. In all these cases it may be said as it was said here that the master has not authorised the act. It is true he has not authorised the particular act but he has put the agent in his place to do that class of acts and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in (u). The words for the master's benefit which occur in this judgment were applicable to the case before the Court but must not be taken as restricting the scope of the rule though there was for some time considerable authority for that reading. If the act belongs to an authorised class it is not material whether the agent intends the principal's benefit or not nor whether the principal in fact derives any benefit. A solicitor's managing clerk having authority to transact conveyancing business on behalf of the firm took a client's instructions to sell some property (by his own advice given with fraudulent intent)

(o) (1874) L. P. 51 C. 394

(p) (1874) 3 App. Cas. 106

(q) (1867) L. R. 2 Ex. 21

(r) (1884) 10 App. Cas. at 130

(s) *Citizens Life Assurance Co. v*

*Brook* [1864] 1 C. 493, 4

(t) See *La gher v J. nter* (1874)

B. & C. 71 at 131 L. R. at pp. 74

31

(u) L. R. 2 Ex. at 11 (1867) 264

and got the deeds from her (which he might properly have done) Then he procured her execution of instruments being in fact conveyances to himself, which the client supposed (as intended by him) to be merely formal papers, and having thus obtained the means of making an apparently good title in his own name, he dealt with the property for his own purposes. The House of Lords (c) held that this was a fraud committed by the manager in the course of his employment for which the principal was answerable. It is clear from the judgments that the rule applies to ostensible as well as to actual authority.

Misrepresentation which will make the principal liable to an action for trespass, deceit, or other substantive wrong will, of course, be a sufficient cause for the other party to avoid an agreement induced by it.

Illustration (a) seems to include both the case of the agent knowing but the principal not knowing the truth of the matter misrepresented and the less obvious one of the agent making a statement without authority, but believing it to be true, while the principal in fact knows it not to be true. In the latter case it was formerly held that a contract thus induced was not voidable, as no fraud had been committed either by the agent or by the principal, but this decision, which was not unanimous, and has been constantly discussed since, is no longer of any practical (w) authority.

Illustration (b) is taken from a modern decision where the real question was as to the extent of the master's apparent authority. It would perhaps have been more appropriate to s. 237. The authority of the master of a ship is very large and extends to all acts that are usual and necessary for the use and enjoyment of the ship, but is subject to several well known limitations. With regard to goods put on board, he may sign a bill of lading, and acknowledge the nature and quality and condition of the goods, but it is not usual for the master to give a bill of lading for goods not put on board. On the contrary, the general usage gives notice to all people that the autho-

(c) *Lloyd v Grace Smith & Co* [1912] A. C. 716 reversing the decision of the C. A. [1911] 2 K. B. 489, *Dina Bandhu Saha v Abdul Latif Molla* (1922) 60 Cal. 258, 68 I. C. 439 A. I. R. 1923 Cal. 157.

(w) *Cornfoot v Foulke* (1840) 6 M. & W. 358, 55 R. R. 655. I should be sorry

to have it supposed that *Cornfoot v Foulke* turned upon anything but a point of pleading. Willes J. L. R. 2 Ex. at p. 262, whose opinion is now universally followed. It is the better opinion that the principal is also liable for a wrong see Pollock on Torts 13th ed., 313.

of *New Brunswick (o) Squire v Francis (p)* and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick v English Joint Stock Bank (q)* which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords, in *Houldsworth v City of Glasgow Bank (r)* and has been followed in numerous other cases " (s)

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(o) (1871) L. J. 5 P. C. 394

(p) (1877) 3 App. Cas. 106

(q) (1867) 1 B. & L. 218, 220

(r) (1840) 5 App. Cas. at p. 320

(s) *Citizens' Life Assurance Co. v*

*Brook* [1904] A. C. 474, 477

(t) See *Laugel v Fother* (1844)

B. & L. 218 at p. 220 and 19 B. & L. at pp. 720

321

(u) 11 B. & L. at p. 11, 20

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(u) *Cornfoot v Fowle* (1840) 6 M & W 358 53 R 1 655 I should be sorry

to have it supposed that *Cornfoot v Fowle* turned upon anything but a point of pleading Willes J L R 2 Ex at p 26 whose opinion is now universally followed It is the better opinion that the principal is also liable for a wrong see Pollock on Torts, 13th ed., 313

ity . is limited to such goods as have been put on board" (x) It has been held by the House of Lords, for similar reasons, that a company's secretary who issues a false certificate of title to shares for his own purposes does not bind the company either as in fact exercising a general authority or by way of estoppel or "holding out" (y)

Fuller illustration of the kinds of acts done by agents which are deemed to be 'in the course of their business for their principals' must be sought in special treatises on the Law of Principal and Agent, or in works on the Law of Torts

The difficulties, which for some time were thought serious, arose partly from reluctance to hold any one answerable for fraud or wilful wrong to which he had not actually been consenting (z), partly from a fallacious opinion that it was impossible for a corporation to be liable for fraud or any other wrong which, in an individual, implies a specific belief or intention. It seems no harder to suppose a corporation capable of deceiving than to suppose it capable of being deceived, and if any innocent individual must answer for the fraud of his agent, there is really less hardship in applying the same rule to a corporation

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**Admissions by Agent.**—Section 18 of the Evidence Act provides that statements made by an agent to a party to any proceedings whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised to make them, are admissions, and s 31, that admissions are relevant and may be proved as against the person who makes them The Contract Act is silent on the subject, but the following brief statement of the English law, on which the provisions of the Evidence Act are evidently founded, may be usefully added here

Statements made by an agent, though not expressly authorised, are admissible against the principal if they have reference to the business on which the agent is employed on the principal's behalf at the time when they are made and are made in the ordinary course of

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(x) *Grant v Norway* (1851) 10 C B at pp 687, 689, 81 R R 760, 762

(y) *Ruben v Great Fingall Consolidated* [1906] A C 439 affirming the decision of the C A [1904] 2 K B 712 See also *Walshechurch v Cavanagh* [1902] A C 117

(z) See for example, per Bramwell B

in *Swift v Jewsbury* (1874) L R 9 Q B at p 315 Lord Bramwell maintained to the last that a corporation could not be sued for malicious prosecution See now *Citizens Life Insurance Co v Brown*, cited note (x) p 690 above

that employment (a) If an agent, employed to buy goods acknowledges the receipt of them, that acknowledgment is evidence against the principal that they have been duly delivered (b) An acknowledgment by a wife, who manages a business on behalf of her husband, and purchases the goods required, as to the state of accounts between her husband and the persons supplying the goods, is evidence against the husband, and if it is in writing and signed by the wife will interrupt the operation of the Statute of Limitations (c) Where a station-master, in the ordinary course of his duty, made a statement to the police as to a porter having absconded the statement was admitted in evidence against the company in an action with reference to a parcel which had been lost in transit (d) But it is not within the scope of an agent's implied or ostensible authority to make statements concerning bygone transactions, and, therefore where a servant of a railway company, in answer to a question why he had not sent on certain cattle consigned to the company for carriage, said that he had forgotten them, it was held that this admission was not relevant against the company in an action for damages for the delay, because it was made a week after the alleged cause of action arose (e) Nor are unauthorised statements made by an agent concerning matters in regard to which he is not employed on the principal's behalf at the time when he makes them (f), or which are not made in the ordinary course of that employment (g), admissible in evidence against the principal, except where the principal expressly referred the person to whom the statements are

(a) *Ellis v. Thompson* (1878) 3 M & W 445 49 R R 679 As to statements in bills of lading signed by shipmaster see *M Lean v. Fleming* (1871) L R 2 H L Sc 128 *Smith v. Belouin & Co* [1896] A C 70, *Lushman v. Christie* (1887) 19 Q B D 333

(b) *Biggs v. Lawrence* (1789) 3 T R 454 1 R R 740 And see *British Columbia, etc Co v. Nettleship* (1868) L R 3 C P 499 (letters written by shipmaster admitted as evidence against the owners of the receipt of goods)

(c) *Anderson v. Sanderson* (1817) 2 Stark 204, 19 R R 703 *Cp Meredith v. Footner* (1843) 11 M & W 202, 63 R R 581

(d) *Kirkstill Brewery v. Furness Railway Co* (1874) L R 9 Q B 468

(e) *Great Western Ry Co v. Wallis* (1863) 18 C B N S 748 144 R R 672

(f) *Parkins v. Hawkshaw* (1814) 2 Stark 239 19 R R 711 *Wilem v. Turner* (1808) 1 Taunt 334 9 R R 797 *Petch v. Lynn* (1810) 9 Q B 147 72 R R 205

(g) *Barnett v. South London Tramways Co* (1897) 18 Q B D 815 (representation by secretary of tramway company that certain money was due from the company) *Girth v. Howard* (1812) 8 Bing 451, 34 R R 751, *Meredith v. Footner* (1843) 11 M W 202, 63 R R 581

made to the agent for information in the particular matter (h). A report made by an agent to his principal for his information cannot be used as evidence against the principal by third persons (i).

**Privilege from distress of goods in hands of agent.**—Where an agent carries on a trade or business in which the public are invited to entrust their goods to him for the purpose of being sold or otherwise dealt with in the course of that trade or business, goods entrusted to him for any such purpose are, while on his premises (j), or on other premises hired by him for any such purpose (k), absolutely privileged from distress for rent. The rule does not extend to agents generally, but only to those, such as factors and auctioneers, who carry on a trade or business of a public nature (l); nor does the privilege attach to goods which at the time of the distress are on premises neither occupied nor hired by the agent, though they may have been sent there to be dealt with in the ordinary course of his trade or business (m).

**Bribery of agent.**—The rights of the principal against an agent in respect of bribes received in the course of the agency are dealt with in the commentary to s. 216. In addition to what is said there it may be mentioned that the receipt of a bribe by an agent justifies his immediate dismissal without notice, although the contract of agency may provide for its continuance for a specified time (n).

As against the person promising or giving anything in the nature of a bribe to an agent, the principal may avoid any contract made or negotiated by the agent, or in the making of which the agent was in any way concerned, whether he was in fact influenced by the bribery or not,

(h) *Williams v. Innes* (1808) 1 Camp 364, 10 R. R. 702

(i) *Langhorn v. Allnutt* (1812) 4 Taunt 511, 13 R. R. 663 (letters from an agent to his principal concerning transactions entered into on his behalf), *Re Devala Provident Gold Mining Co.* (1883) 22 Ch D 593 (statement made by the chairman of a company at a meeting of shareholders), *Leyner v. Pearson* (1812) 4 Taunt 662, 13 R. R. 723

(j) *Williams v. Holmes* (1853) 8 Ex 661, 91 R. R. 802 (auctioneer), *Gilman v. Fitt* (1821) 6 Moo C. P. 243, 23 R. R. 507 (factor), *Finlon v. McLaren* (1845)

6 Q. B. 891, 66 R. R. 588 (commission agent)

(k) *Brown v. Arundell* (1850) 10 C. B. 54, 84 R. R. 457 (room hired by auctioneer, though hired only for the purpose of a particular sale)

(l) *Tapling v. Weston* (1883) 1 C. & E. 99 (agent for the sale of the goods of two particular manufacturers only)

(m) *Lyon v. Elliott* (1876) 1 Q. B. D. 210 (goods sent by A. to be sold by auction together with B's goods on B's premises not privileged)

(n) *Boston Fishing Co. v. Ansell* (1894) 39 Ch. Div. 333

it being conclusively presumed against the briber that he was so influenced (o) Where A, having entered into a contract for the sale of a pair of horses to B, subject to a certificate of soundness from B's agent, secretly offered the agent a certain sum if the horses were sold, and the agent, having accepted the offer, certified that they were sound, it was held that B was not bound by the contract, whether the agent was or was not influenced by the bribe (p) Nor is it necessary that the bribery should have any direct relation to the particular transaction A gift made in order to influence an agent generally in favour of the giver is sufficient to render any transactions entered into by the agent voidable against the giver at the principal's option (q)

The principal may, if he thinks fit, affirm any contract which is voidable on the ground of bribery In such case and also where avoidance of the contract is impossible owing to his not having discovered the bribery soon enough the principal is entitled to recover from the briber, as money had and received, the amount given or promised as a bribe if ascertained (r), or to sue him and the agent, who are liable jointly and severally, for any loss sustained by reason of having entered into the contract, the damages being ascertained without reference to any sum which may have already been recovered from the agent as money received to the principal's use (s)

An agent cannot maintain any action for the recovery of money promised to be given to him by way of a bribe, whether he was induced by the promise to depart from his duty to the principal or not (t) Such a promise, being founded on a corrupt consideration, cannot be enforced by law

**Right of principal to follow property into hands of third persons —** Where the property of the principal is disposed of by an agent in a manner not expressly or ostensibly authorised (u), the principal is entitled as against the agent and third person, subject to any enact-

(o) *Shipway v Broadwood* [1899] 1 Q B 369 (in this case the bribery was discovered in the course of an action to enforce the contract) *Odessa Tramways Co v Mendel* (1877) 8 Ch Div 235, *Bartram v Lloyd* (1904) 90 L T 357

(p) *Shipway v Broadwood* last note

(q) *Smith v Sorby* (1875) 3 Q B D

552 n

(r) *Hovenden v Millhoff* (1900) 83 L T 41

(s) *Salford (Mayor of) v Lever* [1891] 1 Q B 163 *Grant v Gold etc Syndicate* [1900] 1 Q B 233

(t) *Harrington v Victoria Dock Co* (1878) 3 Q B D 549

(u) As to ostensible authority see s 237 and commentary

ment to the contrary (*v*), to recover the property, wheresoever it may be found (*w*)

**Personal liability of agent to repay money received to principal's use.**—An agent is not, as a general rule, personally liable to repay money received by him for the use of his principal, though he may not have paid it over to the principal, and the circumstances are such that the person paying the money is entitled, as against the principal to have it repaid (*x*). Where a solicitor received a deposit at a sale by auction as agent for the seller, and the sale was not completed owing to the seller's default, it was held that no action could be maintained against the solicitor for the return of the deposit, even if he had not paid it over to the seller (*y*).

But an agent is personally liable to repay money paid to him under a mistake of fact (*z*), unless he has paid it over to the principal in good faith, or dealt to his detriment with the principal in the belief that the payment was a valid one, before receiving notice of the intention of the payer to demand repayment (*a*). Merely crediting the principal in account is not sufficient to discharge the agent. There must be an actual change of circumstances to the agent's detriment in consequence of the payment (*b*). Similar principles apply where the money is paid in respect of a voidable transaction (*c*), or for a consideration which totally fails (*d*), or under duress (*e*), or in consequence of any fraud or

(*t*) See, for instance *s. 178* and the commentary thereon pp 548-554 above as to sales and pledges by persons in possession of goods or of the documents of title thereto

(*u*) *Lang v Smyth* (1831) 7 Bing 284, 33 R R 462. *Farquharson v King* [1902] A C 325. *Colonial Bank v Cady* (1890) 15 App Cas 267. *In re European Bank* (1870) 1 R 5 Ch 538. *Mussummat Ram Kaur v Lighter Sing* (1920) 2 Lah L J 516.

(*x*) *Cary v Webster* (1731) 1 Str 480. *Darys v Richardson* (1888) 21 Q B D 202. *Taylor v Metropolitan Fy Co* [1900] 2 K B 55.

(*y*) *Ellis v Goddard* [1893] 1 Q B 350, following *Bimford v Shuttleworth* (1810) 11 V C 102. *2 R R 312*. An

auctioneer receiving a deposit is however personally answerable, because he is in the position of a stakeholder. *Gray v Gutteridge* (1827) 3 C & P 40. *11 R R 343*. *Edwards v Holding* (1814) 5 Taunt 815. *15 R R 162*.

(*z*) *Newall v Tomlinson* (1871) 1 R 6 C P 403. *Huller v Harrison* (1777) Cowp 565.

(*a*) *Hollins v Russell* (1803) 4 R & S 14. *120 R R 635*. *Shand v Grant* (1861) 15 C B N S 324.

(*b*) *Buller v Harrison*, above, 10 R R 284. *v Prentice* (1815) 3 M & S 345. *16 R R 284*.

(*c*) *Hollins v Russell*, note (*a*) above.

(*d*) *Ex parte Bird* (1831) 4 M & S 273.

(*e*) *Queen v Cronk* [1815] 1 Q B 311.

wrong to which the agent is not a party (*f*) If the money is obtained by duress, or by means of any fraud or wrong, to which the agent is a party or privy, he is personally liable to repay it whether he has paid it to the principal or not (*g*) Payment over is no defence in the case of wrong doers (*h*) An agent is also personally liable, notwithstanding that he may have paid the money over in good faith, if it was paid to him in regard to a contract made in his personal capacity (*i*)

**Money received by agent from a third person by fraud.**—Where an agent receives money from a third person by fraud, and pays it to his principal in his account with him, the third person is not entitled to recover it from the principal unless the latter knew or had means of knowledge that it was plaintiff's money (*j*)

## CHAPTER XI

### OF PARTNERSHIP.

[The English Partnership Act of 1890 is sometimes referred to in the commentary by the abbreviation P A ]

This chapter of the Contract Act is to be superseded by a separate Partnership Act which is under consideration of the Legislative Department The draft makes considerable changes in definition and arrangement, gives effect (but short of making the firm a legal person) to the mercantile view of a firm's continuity, and adds provisions for voluntary registration of firms Nevertheless, most of the present commentary will still be applicable Our modern law of partnership was built up, in the course of less than a century, by judicial decisions to which legislation added next to nothing, and the great majority of those decisions were in Courts of Equity The Commission which framed the original draft of the Contract Act included Lord Romilly, for many years Master of the Rolls, and

(*f*) *East India Co v Tritton* (1824) 5 D & R 214 27 R R 353

(*g*) *Oates v Hudson* (1851) 6 Ex 346 86 R R 326, *Halefield v Newbon* (1844) 6 Q B 276, 66 R R 379, *Padget v Priest* (1787) 2 T R 97, 1 R R 440

(*h*) *Sharland v Mildon* (1846) 5 Hare, 469, 71 R R 180. *Ex parte Edwards* (1884) 13 Q B D 747

(*i*) *Gurney v Womersley* (1854) 4 L & B 133 99 R R 390 *Newall v Tomlinson* (1871) L R 6 C P 405 As to when an agent is to be considered as contracting personally see commentary to s 230, ante, p 635

(*j*) *Morarij Premji v Mulji Ranchhod* 1 ed & Co (1923) 25 Bom L R 1014, 1022 1023, 77 I C 266 A I R 1924 Bom 232

Sir William James, Vice Chancellor, and afterwards Lord Justice, who was second only to Jessel among modern equity lawyers. Hence the chapter on Partnership is perhaps the best in the Act. Comparison with the English Act of 1890 will show that it was of great use to the English draftsman of the digest which ultimately became the ground work of that Act. For English purposes, however, it was necessary to go more fully into details, and the Partnership Act contains nearly twice as many sections as the present chapter (A). It is possible that the Indian Law Commissioners might have done better if they had been less brief, but they did very well, and almost the only thing to be regretted about this part of their work is that they were so sparing of illustrations, which in this subject would have been particularly appropriate.

Lord Lindley's statements of English judicial practice are sometimes cited without further reference to authority. For all purposes, except that of being technically binding on the Court (which English decisions themselves are not in British India), they carry at least as much weight as most reported judgments.

**239.**—"Partnership" is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them.

*Partnership defined*      *'Firm' defined*      Persons who have entered into partnership with one another are called collectively a "firm."

#### *Illustrations*

(a) A and B buy 100 bales of cotton, which they agree to sell for their joint account. A and B are partners in respect of such cotton.

(b) A and B buy 100 bales of cotton, agreeing to share it between them. A and B are not partners.

(c) A agrees with B, a goldsmith, to buy and furnish gold to B, to be worked up by him and sold, and that they shall share in the resulting profit or loss. A and B are partners.

(d) A and B agree to work together as carpenters, but that A shall receive all profits and shall pay wages to B. A and B are not partners.

(e) A and B are joint owners of a ship. This circumstance does not make them partners.

**Definition and essentials of partnership.**—A large number of definitions of partnership will be found collected in the first chapter of

(A) For the history of the English codification see the Preface to Pollock's *Digest of the Law of Partnership*.

Lord Lindley's standard treatise. The first paragraph of the present section is a simplified form of Kent's definition (l), which was adopted by Story. The definition which stands in the English Act, "The relation which subsists between persons carrying on a business in common with a view of profit," is novel, it appears to be founded on the following dictum of the Judicial Committee in an Indian case decided on the analogy of English law — "To constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common" (m). It will be observed that the definition in the Partnership Act does not mention sharing as distinguished from making profits, and it has been suggested that in England persons may be partners in an undertaking carried on by them in concert without aiming at personal gain, or even on the express terms that none of them shall derive any individual profit from it, and that the object of dividing profits, though almost always important in fact, 'points to the conclusion that it is rather an accident than of the essence of the partnership relation' (n). It is clear that this opinion did not occur to Kent, or Story, or the framers of the Contract Act, or Sir George Jessel, who said that partnership is at all events a contract for the purpose of carrying on a business bringing profit and dividing the profit in some shape or other between the partners (o). Not only a common business but a common interest in it is essential (p). However, if any difficulties arise from the new English definition they must be solved by English Courts (q). Under the present section there can be no doubt that agreement to share profits is essential to the constitution of a partnership.

Kent's definition was criticised by Sir George Jessel in the judgment just now cited (o) on the ground that there may be a dormant partner

(l) Partnership is a contract of two or more competent persons to place their money, effects labour and skill or some or all of them in lawful commerce or business and to divide the profit and bear the loss in certain proportions. Kent Comm iii 23

(m) *Molloy March & Co v Court of Wards* (1872) L R 4 P C 419 436 10 B L R 312 320 on appeal from (1869) 3 B L R A C 238

(n) Lindley p 10 in editorial addition

(o) *Looley v Driver* (1870) 3 Ch D 458 472 473

(p) *Cp Isbadat v Kambal* 8 I C 283 A I R 195 Nag 436

(q) We should submit if it were relevant here that a committee managing the affairs of a society or the like without a view to individual gain may in particular cases incur liabilities resembling those of partners by holding out or by actual agency but there is no presumption of authority to pledge their common

such as the widow of a former partner succeeding to his share by virtue of a provision in the articles, who contributes nothing. But, with great respect, there is no such word as "contribute" either in Kent or in the Contract Act. A dormant partner's share is no less his property because it is acquired by gift, or in pursuance of a contract to which he was not a party, and he does combine his share with those of the other partners whether he can be properly said to contribute it or not.

If all the requisites of a partnership are present, the fact that one or some of the partners are to have the sole control of management and are empowered by the terms of the deed to determine the partnership does not negative the idea of partnership (r).

**Co-ownership and partnership.**—There is not partnership without combination to carry on a business, and therefore the mere fact that persons own in common something which produces returns, and divide those returns according to their respective interests, does not make them partners. "Persons who have no mutual rights and obligations do not constitute an association because they happen to have a common interest or several interests in something which is to be divided between them" (s). No one ever suggested that co-owners of a house let to a paying tenant, for example, are partners either as to the house or as to the rent. Their shares are distinct, independent and separately alienable. If they used the house as an hotel managed by themselves or their agent for their common profit they would be partners in the business of hotel keeping (t). Property may even be acquired in common in order to make profit of it without creating a partnership. If A, B, and C agree to buy land on joint account, and for interests proportioned to their contributions, and to form a company to take it over and use it for profit, this will not make them partners, A, B, and C have distinct shares in the property, uncontrolled except by the specific agreement, and if the company is formed and buys the land each of them will be separately entitled to the price of his share (u).

credit, and it must be a question of fact in every case to whom credit was given.

(r) *In re Ambold & Carroll* (1923) 32 Bom L R 122, 77 I C 633. A I R 1924 Bom 162.

(s) *James I J in South v. Gifford* (1880) 15 Ch Div at ¶ 275.

(t) This needs no authority but *French*

*v. Stirling* (1857) 2 C B N S 117, 109

R R 716 may be referred to see per

Wilkes J. 2 C B N S at p 110, 109

R R 722. Similarly joint mortgagors

are partners. *Mitchell v. Timokind* 110 I C 646. A I R 1924 Nag 177.

(u) *Laidlaw v. Pinner* (1884) 26 Ch D 107, 143.

If they had started the proposed business on the land on their own account instead of selling to the company, they would have been partners though the land would be partnership property only if they originally acquired it for the purpose of the joint business, or expressly agreed to bring it into the partnership stock (s 253, sub s 1, pp 701, 702, below) An agreement which is in effect for the acquisition of property in shares and leaves the parties to do severally what they please with it will not be made a partnership even by the use of that word (t)

As to ships in particular, it has long been settled that part owners of a ship are not necessarily partners (u), but if they employ the ship in trade or adventure on their joint account they are partners as to that employment and the profit thereby made (x)

Where persons enter into an agreement constituting a partnership limited to a joint trading adventure, and goods are purchased, ostensibly by an individual adventurer but really for the purpose of the joint adventure the adventurers are liable as partners but there is no such responsibility for goods purchased before the partnership agreement upon the credit of an individual adventurer though they are afterwards brought into stock as his contribution to the joint adventure (y)

Since the fact that several persons are co owners of a ship does not make them partners (Illustration (c)) a suit by one co owner against another for his share of the sale proceeds of the ship and the profits earned by the ship before sale is not such a winding up suit as is contemplated by s 265 (p 724, below) (z) But cases may sometimes occur in which a partnership exists between persons owning a ship and the ship may be part of the assets of the firm but in such a case some contract of partnership exists between the parties or some joint business is carried on by them to which owning of ships is merely accessory (a)

(t) *Abdullah v Allah Dya* (1927) 8 Lah 310 100 I C 846 A I R 1927 Lah 333 Here not only a business carried on in common but even a common interest is wanting.

(u) *Helie v Smith* (1831) 1 Bin. 611 713 33 R R 630 633

(z) *Green v Briggs* (1847) 6 Ha 395 77 R R 156 *Tanamati Sattiraj v*

*Bhappigada Pallaraju* (1918) 41 Mad 913 47 I C 640

(y) *Karmali v Jora Karanja* (1915) L R 41 I A 48 38 Bom 61 46 I C 915

(z) *Hyder Ali v Elhee Bx* (1883) 8 Cal 1011

(a) *Id* p 1013

**Profits.**—The profits contemplated by the Act, and by the common law of partnership, sometimes called “net profits,” “are the excess of returns over advances, the excess of what is obtained over the cost of obtaining it” It was formerly common to speak of the total receipts or gross returns of a business as “gross profits” This is objectionable, and should be avoided (b) Obviously there may be very large gross returns and yet little or no real profit Sharing gross returns will not create a partnership, as the English Act (s 2, sub s 2), in affirmance of the general law, has expressly declared The owner of a theatre lets a travelling manager and his company use the building, scenery, appliances, and permanent staff, in consideration of receiving half the money taken from spectators This does not make the owner answerable as partner or principal for anything done by the manager which may be the subject of suits or penalties, such as infringement of dramatic copy right (c) Similarly the author of a book receiving a royalty on copies sold is not a partner with the publisher, and it seems that he is not so even if the agreement is to divide profits, the publisher taking all risk (d)

**Sharing profits.**—As common interest will not make a partnership without division of profits, so sharing of profits will not unless there is really a common business The following sections, from 240 to 244, are only some special applications of this principle Sharing the profits of an undertaking is not of itself a partnership, though the existence of partnership may often be inferred from it “It is said (and about that there is no doubt) that the mere participation in profits *inter se* affords cogent evidence of partnership But it is now settled by the cases of *Cox v Hickman* (e), *Bullen v Sharp* (f), and *Molluo, March & Co v Court of Wards* (g), that although a right to participate in profits is a strong test of partnership, and there may be cases where upon a simple

(f) Lindley, 41, 42

(c) *Lyon v Knowles* (1861) 3 B & S 56, 5 B & S 751, 129 R R 452 456

(d) Lindley, 64, Pollock, 16, and see per Lord Brougham and Lord Wensleydale in *Cox v Hickman* (1860) 8 H I C at p 277 125 R R at p 153 & on a quarrel with literary business can suppose that in fact the printer, binder etc give credit to any one but

the publisher The relations between authors and publishers or editors really form a distinct species of contract about which there is less authority than might be expected

(e) (1860) 8 H I C 268 125 R R 148

(f) (1845) 1 R I C 180 181 Ch

(g) 1 R I P C 410

participation in profits there is a presumption, not of law, but of fact, that there is a partnership, yet whether the relation of partnership does or does not exist must depend upon the whole contract between the parties, and that circumstance is not conclusive" (h). Before the decision of the House of Lords in *Cox v. Hickman* (i) it was supposed that every one who took a share in the profits of a business was liable as a partner to outside creditors, whatever might be the terms as between himself and the persons actually conducting the business. But the true test is not whether a man receives a share of profits; it is whether the business is being carried on by him, or by another on his account, so that he is a principal. Creditors who supervise the conduct of their debtor's trade, with an agreement to pay themselves off out of the profits, do not thereby become his partners (i), and the same principle applies to trustees for debenture holders. A receiver whom they have appointed under their powers is not their servant, and does not become so, or make them liable for his contracts, even after he has ceased, by the winding up of the company, to be the company's agent (j). The question is really one of agency and authority (k).

In the leading case in the Privy Council, where it was first clearly laid down that the question whether the relation of partnership does or does not exist, "must depend on the real intention and contract of the parties" (l), there was a contract between a partnership firm and a third person whereby it was agreed that he should receive in consideration of advances a commission on the net profits of the partnership business, and large powers of control over the business were given to him for his protection, but no power to direct transactions. This was decided to be a contract not of partnership, but of loan and security

(h) *Jessel M R, Ross v. Parkyn* (1875) L R 20 Eq 331, 335, closely following the language of the Judicial Committee in *Molloy, March & Co's case*

(i) Note (e) above. *Molloy, March & Co v. Court of Wards* was essentially a similar case, in which powers of control and retaining profits, or a percentage of them, towards payment of his debt, were given to a single creditor

(j) *Gosling v. Gaskell* [1897] A C 575. It would seem that after that date the receiver was personally liable on contracts

made by him, as having no principal who could be sued

(k) See the comments on *Cox v. Hickman* in *Bullen v. Sharp*, note (f) above

(l) *Molloy, March & Co v. Court of Wards* (1872) L R 4 P C 419, 10 B L R 312, 320, on appeal from 3 B L R A C 238, supp vol I A 86. For a simpler case of a payment proportional to profits being merely remuneration to an agent, see *Decy of State v. O I P Py Co* [1924, P C] 49 Bom 320 88 I C 107, A I R 1925 P C 103

between a debtor and a creditor (m) The same principle is applied to other kinds of transactions An agreement by A to pay Z, in consideration of his guaranteeing A, in underwriting business, a certain proportion of A's profits in that business, does not make Z a partner with A (n) Again, if a deceased partner's executors are entitled by the articles to receive his share of profits during the rest of the partnership term if he dies before its expiration they are not thereby made partners (o) It must be remembered that in all cases the result depends on the real contract and intention of the parties as shown by all the facts It is settled or highly probable that certain kinds of facts are not alone sufficient to constitute partnership The question how much must be added to produce that result is not capable of any general answer, save that modern Courts may be expected, on the whole to treat men as partners when and so far as a sensible man of business would consider them so

In an ordinary club the committee has no authority to pledge the credit of the members at large and the members are not liable for debts incurred by the committee As in such a case no single element of the contract of partnership is present it is rather hard to see how the members can ever have been supposed to be liable as partners, but it was once thought arguable and even said to be the common opinion (p)

**Partnership and service** — Sometimes it is not easy to draw the line between a partnership and a payment of salary by a share of profits The owner of a ship, who has been paying the master fixed wages hands over the management of the ship to the master on the terms of receiving a fixed share of profits from him Does this leave the master the owner's servant, though a servant with large discretion or make him a partner with the owner in the adventure? Probably the latter but either opinion is plausible (q)

It is even possible for Z both to receive a share of the profits of A's business and bear a share of losses, and yet, by the special terms of their agreement, to be in the position of a servant as regards A, and not

(m) See footnote (l) last page

(n) *Ex parte Tennant* (1877) 6 Ch Div 303

(o) *Holme v Hammon* (1872) 1 R 1 x 218

(p) *Flaming v Hector* (1836) 2 M & W

172 46 R 1 573

(q) *Steel v Lester* (1877) 3 C 1 D 121 per Lord J at pp 127 128 All that had to be decided was that one way or another the owner remained liable to the master and not vice

entitled to the remedies of a partner (r) We do not know of any decision that a person in such a position was not liable as a partner to creditors of the business Conversely, receipt of a fixed salary in lieu of a share of profits is consistent with being a real partnership if the intention of the parties to be partners is otherwise apparent (s)

**The firm**—By the current usage of affairs, a firm is distinct from its members They may have claims on the firm's property, but it is not theirs It has separate accounts, and is their debtor and creditor Quite possibly some person who is not a member of the firm may have authority to do certain things in its name which some or one of the partners have not In short, the firm is treated very much as if it were a corporation, it is an artificial or "moral" person for business purposes, and in some systems of law this personality receives formal acknowledgment "In Scotland," in particular "a firm is a legal person distinct from the partners of whom it is composed" (t) though the individual partners may be liable for its debts But the Common Law has no means of admitting any kind of legal existence between that of a formally constituted corporation and that of an individual human being (though the procedure of Courts of Equity can go near it in what are called representative suits), and for English jurisprudence the firm is only a compendious name for certain persons who carry on business, or have authorised one or more of their number to carry it on in such a way that they are jointly entitled to the profits and jointly liable for the debts and losses of the undertaking For the purpose of determining legal rights "there is no such thing as a firm known to the law" (u) and this is so likewise under this Act (v) It is true that under the Code of Civil Procedure, 1908, O XXX as under the English Rules of Court (now O XLVIII A) and we are informed, by statute

(r) *Walker v Hirsch* (1884) 27 Ch Div 460

(s) *Paghnundan Vanu v Hormayee Bezongjee* (1906) 51 Bom 342 100 I C 1020 A I R 1907 Bom 187 Under a memorandum of co partnership agreement the party who was to be in charge of the firm was to receive a fixed salary and commission on net profits but got no shares of profit of the firm held that this meant no other share and he was a partner

*Paghumull Khandelwal v Official Assignee* (1933) 28 C W N 34 81 I C 17

(t) Partnership Act s 4 sub s 9

(u) *James L J Ex parte Corbett* (1880) 14 Ch Div 122 106

(v) *Seedoyal Khemla v Joharmull Manmull* (1933) 50 Cal 549 50S A I R 1924 Cal 74 75 I C 81 (amendment of title of suit) *Brojo Lal Saha Banikya v Budh Nath Pyarila & Co* (1927) 55 Cal 501 100 I C 549 A I R 1928 Cal 148

in many other jurisdictions, actions may be brought by and against partners in the name of the firm, and even between firms and their members, but this is only a matter of procedure (*w*) Partnership property, again, is recognised in more than one way, but only as that which is "joint estate" of all the partners as distinguished from the "separate estate" of any of them, not as belonging to a body distinct in law from its members

Under our normal law (*x*) there are no prescribed forms for the style of a firm, and the liberty of partners to assume any firm name they please is bounded only by the general rules as to goodwill (p 703, below) and trade names (*y*) A firm name may be personal or impersonal, singular or plural, and need not contain the name of any existing partner The style of one well known bookselling house in London consists simply of the name of the original founder, long since dead "X & Co," "X, Y & Z," "The X Co," "X & Son," "X's Sons" (common in America), "X Brothers" and other varieties, are alike usual and allowed Also there is no general rule to prevent a sole continuing member of the firm of X & Co, from continuing to trade as X & Co, nor indeed to prevent X or Z, who has never had a partner, from trading under the style of X & Co, provided that he is not thereby doing wrong to an existing X & Co Most commercial countries not under the Common Law have precise regulations in these matters The principle of the Common Law, on the other hand, is to allow great latitude in the use of personal names so long as they are not assumed or changed for purposes of deception "Individuals may carry on business under any name and style they may choose to adopt" (*z*), provided they do not adopt a name tending to mislead the public into confusing them with others already trading under the same or like names It is not true, on the other hand, that a man has a positive and universal right to employ his usual name As a rule the mere fact that a rival's name resembles his own is no reason for restraining him

(*w*) It does not authorise the use of the firm name so as to make a partner in substance both plaintiff and defendant *Mejer & Co v Fisher* [1923] 2 Ch 421 (CA)

(*x*) The Illustration of Business Names Act 1916 extends only to the United Kingdom and does not limit the

choice of names

(*y*) In rare cases the concealment of one's usual name may be fraudulent (p 132 above) This could hardly apply to a firm

(*z*) 111 C.J., *Ma ghan v Sharje* (1841) 17 C.B.N.S. at p 412 *Lery v Barker* (1871) 10 Ch Div 431 44

from dealing in the name he has always borne. The Court will not interfere merely because the similarity may be an occasion for careless people to make mistakes. Lord Justice Knight Bruce said in a celebrated judgment: "All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers" (a). A man has no monopoly in his name, the question of substance is always whether the defendant is trying to pass off his wares as the wares of another, and this must be decided according to the evidence in each case. Where fraudulent intention is shown, on the other hand, it is not a sufficient answer for the defendant to say that the name he is using in business is the name he has adopted for all purposes, freedom of choice does not extend to choosing just that name which will enable one to appropriate the reputation of another man's goods (b). The same reasons apply to the use of corporate names (c) and firm names (d), and also to the use of distinctive trade names for goods (not to be confused with registered trade marks), in this last case a name which, taken alone, is a literally true description of the goods sold under it may be rendered fraudulent by the manner and circumstances of its use (e). "A statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it, it is not sterling coin, it has no right to the genuine stamp and impress of truth" (f). Even a true name, personal or other, is not a commodity to be sold and trafficked in without regard to the use that may be made of it (g).

It will be remembered that the number of persons who may form an ordinary partnership is limited both in England and in India by the Companies Act (see s. 266, p. 730 below). These provisions supersede

(a) *Pargosa v. Pargosa* (1873) 3 D. M. & G. 806, 903. See also the judgment of Turner J. at p. 903 (1871) 13 Q. B. 347, 352.

(b) *Isotid & Co. v. Vass & Lox & Lox* [1888] 1 Q. B. 173.

(c) *Standard & Son Life Assurance Co. v. Capital* [1884] 1 Q. B. 527.

(d) *Tait & Co. v. Tait & Co.* (1888) 42 Q. B. 197. 1888, 1889, & 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 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2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 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2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 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the question, speculative and antiquarian even in England, whether it is an offence to assume to act as a corporation (*h*)

**Joint Hindu family firm.**—The case of joint ownership in a trading business created through the operation of Hindu law between the members of an undivided Hindu family must be distinguished from that of an ordinary partnership arising out of contract (*i*) The rights and liabilities of the coparceners in the former case cannot be determined by exclusive reference to this Act, but must be considered also with regard to the general rules of Hindu law which regulate the transactions of united families According to those rules, the death of one of the coparceners does not dissolve the family partnership, nor, as a rule, can one of the coparceners, when severing his connection with the business, ask for an account of past profits and losses (*j*) Further, the managing member of the family can pledge the credit or property of the family for the ordinary purposes of that business (*k*), but the other coparceners are liable to the extent of their interest in the family property only, unless the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other coparceners are actual contracting parties or one which they have subsequently ratified (*l*) And though a trade, like other property, is descendible amongst Hindus, it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading firm, so as to require him to join as a plaintiff in suits on dealings and transactions with the adult members of the family carrying on the family business (*m*) In the case, however, of a partnership composed of certain individual members of a joint Hindu family and others who are

(*h*) See Pollock *Digest of Partnership* 12th ed. 27

(*i*) No such joint family business is known to Mahomedan law *Solema Bibi v. Hafez Mahomed Hassan* (1927) 51 Cal 687 104 I C 833 A I R 1927 Cal 836

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property for embarking on an entirely new business *Morris v. Perceval* (1901) 6 C W N 473

(*l*) *Chaitanyaji v. Karatijaji* (1898) 22 M L J 106, *Bhambhar Nath v. Shevarain* (1906) 29 All 106, *Jishanhar Nath v. Fateh Lal* (1906) 29 All 176 *Simalbhai v. Someshwar* (1880) 5 B m 38

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**240.**—A loan to a person engaged or about to engage in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such (p).

Sections 240 to 244 superseded a special Act XV of 1866, which reproduced, with one addition (now s 241) (q), the provisions of the English Act, 28 & 29 Vict, c 86, often called Bovill's Act. This Act was superseded and repealed by s 2, sub s 3, of the Partnership Act, 1890. It was the somewhat illogical result of the desire expressed by a considerable number of business men for the introduction of the system of "commandite" partnership which has long been familiar on the continent of Europe. That is a system of true limited partnership in which one or more active members are liable without limit as ordinary partners, but the others are liable only to the extent of the capital they respectively contribute or undertake to contribute. Later it was supposed that the facility of forming limited companies had made limited partnership unnecessary, but the demand was renewed (Bovill's Act being satisfactory neither in substance nor in form), and a Limited Partnerships Act (7 Ed 7 c 24) was passed in 1907. There

(n) See *Inant Pam v Channu Lal* (1903) 25 All 378.

(o) *Ganga Jya v Venkataramiah* (1918) 41 Mad 454, 43 I C 9, *Ajaridhar Kapra Co, Ltd v Daya Krishan* (1921) 43 All 116, 58 I C 765, *Harnadas v Mayadas Lakhmichand* (1925) 87 I C 905, A I R 1925 Sind 310, *Mirza Mal v Parneshar*, All L J (1929) 641, 118 I C 145, A I P 1929 All 536.

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Lahori firm in Malras appear to be within this section. *Pe Abdul Faki nuan Sahib & Co* (1926) 51 Mad 308, 112 I C 486, A I P 1926 Mad 890 (decided on English case law without reference to either Indian or English legislation but it comes out right).

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is not much to be said about its operation. The "private companies" recognised by the Companies Act, 1929, s. 26, are found in practice more useful, but this does not concern us here.

It is now well understood, though at the time it was not, that these enactments really added nothing in principle to the law settled by the decision of the House of Lords in *Cox v Hickman* (pp. 672, 673, above). Since that decision, apart from any legislation, "it is not longer right to infer either partnership or agency from the mere fact that one person shares the profits of another" (r). That fact is relevant, but not decisive, and not to be taken by itself as if it raised a special presumption and laid the burden of proof on the party denying a partnership. All the facts must be considered together (r). The mere fact that parties call themselves partners in a writing embodying the agreement between them does not constitute "partnership" within the meaning of s. 239, if the true relation be that of creditor and debtor (s). On the other hand, an agreement which purports to be by way of loan and security may be in reality one of partnership, and will be given effect to as such, "for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character" (t). This principle was applied in an English case where the agreement with the so-called lender gave him many of the powers of a partner, and the loan was not repayable till the expiration of the partnership admitted to exist between the debtors. The lender was held to be liable as a partner for their debts (u). The same result followed where, in addition to similar incidents, the capital of the business consisted wholly of the sum described as a loan (v).

**241.**—In the absence of any contract to the contrary,

Property left in business by retiring partner, or representative of a deceased partner, used in the business is to be considered a loan within the meaning of the last preceding section

(r) *Badell v Consolidated Bank* (1884) 13 Ch. Div. 239 per Lindley J. J. at p. 250. *Porter v Ince* (1904) 10 C. W. N. 313.

(s) See *Bhagya Lal v De Crouther* (1881) 1 All. 74.

(t) *Molloy v March* (1872) 10 B. & P. 712 L. 1.

(u) *Loe v Driscoll* (1878) 5 Ch. D. 474.

(v) *Ex parte Debi* (1878) 7 Ch. D. 11.

There is nothing verbally resembling this section in the repealed English "Act to amend the law of partnership" of 1865, nor has it been adopted in the Partnership Act, 1890, but under that Act the case is covered by the general words of s 2, sub s 3, which only declare the effect of *Cox v Hickman* (pp 672-673, above). In a good many cases under this section the facts would also fall under s 243 which see.

The case of a retired or deceased partner's share being left in the business without any final settlement of accounts is not expressly dealt with here or in any other section of the Act. If, while it so remains, the partnership is dissolved, the English rule (P A s 42) is followed, whereby the outgoing partner or his estate may elect between the profits found to be attributable to the use of his share since dissolution and interest on the amount of the share (*w*).

## 242.—No contract for the remuneration of a servant

Servant or agent  
remunerated by  
share of profits  
not a partner or agent of any person, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

An agreement to give the gomasta of a firm a specified share of profits in lieu of salary does not constitute him a partner, and such was the practice and understanding before the Act (*x*). The principle has been explained, and English authorities referred to, under s 239.

## 243.—No person, being a widow or child of a deceased

Widow or child  
of deceased part-  
ner receiving an  
annuity out of profits  
not a partner partner of a trader, and receiving, by way of annuity, a proportion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him (*y*).

(*w*) *Ra akrishna Iyyar v Muth saras Iyyar* (1928) 52 Mad 672. 121 I C 609.  
Flection need not be made until accounts are taken and the share of profits ascertained.

(*x*) *Randoyal v Jinnemsoj* (1887) 14 Cal 791 (no dispute on this point).

(*y*) *Palhakishendas v Gangaba* 103 I C 172. A I R 1927 S 1218.



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5.

244.—No person receiving, by way of annuity or other wise, a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities

There do not seem to be any reported Indian decisions on this or the preceding section. We have nothing to add to the general explanation in the commentary on s 239

245.—A person who has, by words spoken or written or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as partner in such firm

Person receiving  
portion of profits  
for sale of good  
will not a partner

Responsibility  
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“Holding out.”—This is the rule of liability by “holding out,” more fully stated in s 14 of the English Act. The present section omits to say that the other party must in fact have given credit to the firm in the belief, induced by the express or tacit representation of the supposed partner, that he is a member of the firm. But the omission, if inelegant, is harmless, for without such facts there is no ground for holding any one responsible. Any representation of this kind ‘can only conclude the defendants with respect to those who have altered their condition on the faith of its being true’ (z). In fact, this kind of liability is neither more nor less than a special application of the principle of estoppel (a). The language of the following section is more explicit

As long ago as 1829 the rule was laid down incidentally by a great master of our law. Parke J said that if in the case then before the Court “it could have been proved that the defendant had held himself out to be a partner, not ‘to the world’—for that is a loose expression—

but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement " (b)

Nearly half a century later the doctrine was more concisely stated in the course of the judgment delivered in a leading case before the Judicial Committee which we have already cited on s. 239 —

"Where a man holds himself out as a partner, or allows others to do it — he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel " (c)

"No evidence of intention or knowledge of the consequences of his acts and conduct is necessary to make the apparent parties liable " (d)

**Proof of "holding out"**—Observe that under this section, with which the extract just given appears to agree, the creditor need not prove specifically that he gave credit to the firm on the faith of a certain person being a partner in it. Giving credit to a firm is the same thing as giving credit to all and each of the persons believed by the creditor to be its members. In England neither judicial authority nor legislation (e) seems to go quite so far. It is question of fact in each case whether credit was given on the faith of the representation. But, when the representation and the creditor's knowledge of it are proved, the remaining inference is so easily drawn that the results will almost always be the same. As the liability depends on estoppel and not on any contract between the apparent partners, it is immaterial what the agreement between them, if any, may really be.

An estoppel of this kind (or of any kind) cannot result from the mere unauthorised act of a third person, such as the exhibition by a

(b) *Dickinson v Walp* 10 B & C 128  
140, 34 R. R. 348 355

(d) *Porter v Ince* (1903) 10 C. W. N.  
313 390

(c) *Molloy March & Co v Court of  
Wards* L. R. 4 P. C. at p. 435

(e) *Partnership Act* s. 14

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(b) *Dickinson v. Velje* 10 B & C 18  
140 34 R R 318 35

(c) *Willco March & Co v. Court of  
Wards* 11 4 P C at p 42

(d) *Lutter v. La H* (1891) 11 C W N  
313 340

(e) *Partnership Act* s 14

secretary of a list of intending shareholders "The holding one's self out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used" (f). On the other hand, there need not be any direct communication between the creditor and the apparent partner, and the latter need not be mentioned by name if he is sufficiently identified by description as one of the parties interested, or the like (g).

It will not be overlooked that facts capable of being used to establish a case of liability under this or the next following section will often be relevant to show that a partnership really did exist, and, as the Evidence Act declares (h), when persons are shown to have acted as partners, the burden of proof is on those who say they were not partners. This is not estoppel, but a matter of common sense inference.

The estates of insolvent persons who were ostensible partners may have to be administered in bankruptcy as if they had been real partners (i).

**246.**—Any one consenting to allow himself to be represented as a partner is liable, as such, to third persons who, on the faith thereof, give credit to the partnership.

Liability of person permitting himself to be represented as a partner

**Holding out by acquiescence.**—This would seem on principle to be a particular case of leading another person to believe that one is a partner, but the liability is declared in different terms from those used in the foregoing section, and apparently with the intention of making a presumption in favour of the creditor in one case and not in the other (see on s 245, p 682 above). There is nothing to show how much more than passive assent is signified by the "consenting" of this section, and the same remark applies to the corresponding words

"knowingly suffers" of the English Act s 11. It can hardly be the law that if A hears a report that Z is representing him as a partner in

(f) *For v. Elfrin* (1870) 11 B. & C. 771.  
(g) *For v. Elfrin* (1870) 11 B. & C. 771.  
(h) *For v. Elfrin* (1870) 11 B. & C. 771.

(i) *For v. Elfrin* s 11.

(j) *For v. Elfrin* (1870) 11 B. & C. 771.

(k) *For v. Elfrin* (1870) 11 B. & C. 771.

X. & Co, he becomes bound at his peril to notify to the world that he is not. But there is an amount of silence, in the face of known persistent representations made to persons likely to be misled, which may be good evidence of consent. All that can be said in general terms is that prudent men will rather use a little abundant caution in due season than run the risk of much more trouble at a later time.

In practice questions of this kind are suggested mainly by the case of a deceased or retired member's name being continued in the firm. Since our law does not in any way require the style of a firm to correspond with the names of actual partners (pp 675, 676, above), the presence of a given name is of itself no representation that any person bearing that name is in fact a partner. It is accordingly well settled that the continuance of a deceased partner's name will not make his estate liable for partnership debts contracted after his death (j). But a living retired partner may be exposed to risk in this way, that customers of the firm who have no notice of his retirement by a change of style or otherwise may go on dealing with the firm on the faith of his being a member (see s 261, p 722, below, and s 36 of the English Act). Therefore it is prudent and usual to notify customers of changes in the constitution of the firm. No creditor, however, can hold a retired partner liable whom he did not know to be a partner before the change in the firm, and who had ceased to be a partner in fact when the credit was given. Thus a "dormant partner," i.e., one not generally known to be such, "may retire from a firm without giving notice to the world" (k).

Strictly speaking, it seems that in the case of a retiring partner the representation that he is still a member of the firm is not made by others and consented to by him, but is his own, for, much oftener than not, credit given on the faith of his being a partner is so given not because the other partners say anything, but because he has said nothing. Indeed, the presence of a particular name in the firm has very little to do with the matter, save so far as the disappearance of a personal name may be a warning that some member of that name has died or retired. A retired member of a firm with an impersonal name might be liable to a customer who had known him to be a member (l).

(j) See Partnership Act, 1890, ss 14 (2), 172, 177, 38 R. R. 237, 242  
36 (3)

(l) See *Carter v. Walley* (1830) 1 B. &

(k) *Heath v. Sansom* (1832) 4 B. & Ad. Ad. 11, 35 R. R. 199, where the firm was

inaccurate usage has been very common and perhaps it is past criticism. As regards the word 'share' used in this section it has been held by the Judicial Committee that it is no more than a right to participate in the property of the firm after its obligations have been satisfied (rrr). The legal title or interest in partnership property will, as a rule, be found to be in the partners jointly, but that is quite another matter.

**Hindu minor's ancestral trade**—There is no difference in principle between the nature of the liability of an infant admitted by agreement into a partnership business and that of one on whose behalf an ancestral trade is carried on by his guardian. A minor Hindu therefore on whose behalf such a trade is carried on, is not personally liable for the debts incurred in such trade, but his share therein is alone liable (s).

**248.**—A person who has been admitted to the benefit of partnership under the age of majority becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.

In England an infant partner who continues to act as a member of the firm after his full age or, having acted as such during his minority, does not disclaim, is answerable for debts of the firm contracted since his majority, because he is at least an ostensible partner. But he is not conclusively held to ratify obligations contracted during his minority (t). The present section, by including such obligations has distinctly enlarged the creditor's rights. As regards a joint Hindu family firm it has been held that a member of the family on attaining majority does not necessarily become personally liable for debts contracted in the joint family business during his minority (u).

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- (rrr) *Singam Charan Manlal v. 687 Sanku Krishna v. The J. and*  
*Ar. Chaudhan Jangra* (1922) 1 R. 43 *B. v. 1912) 3 M. 102 111 C. 70*  
*I. A. 108 49 Cal. 550, 671 C. 111* *Narain Datta v. His Brothers* (1911) 11 C. 45  
 (s) *J. & L. v. N. H. v. 1878) 1 C. 111* *Rec. no. 111 70 311 C. 45*  
*700 v. J. & L. v. 1878) 1 C. 111* (t) *C. v. L. v. 1878) 1 C. 111*  
*100 v. 700 v. 700* (u) *C. v. L. v. 1878) 1 C. 111*  
*100 v. 100 v. 100* (v) *O. v. L. v. 1878) 1 C. 111*  
*100 v. 100 v. 100* (w) *C. v. L. v. 1878) 1 C. 111*  
*100 v. 100 v. 100* (x) *C. v. L. v. 1878) 1 C. 111*  
*100 v. 100 v. 100* (y) *C. v. L. v. 1878) 1 C. 111*  
*100 v. 100 v. 100* (z) *C. v. L. v. 1878) 1 C. 111*

We have not to consider here the position of an infant shareholder in an incorporated company, but the case is expressly covered by the Transfer of Property Act, 1882, s. 127, whereby an "onerous gift to" a "disqualified person" must be returned after full age, etc., with the burden, if at all (t)

**249.**—Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership; but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner

**Nature of partnership liabilities**—The first branch of this section represents what was supposed to be the rule of equity in England before the House of Lords decided, in 1879, that a partner during his lifetime is not severally liable for debts of the firm, but only jointly with the other partners (w), though a deceased partner's estate can be made severally liable, and liability for wrong or fraud committed in the course of partnership business is also joint and several (P. A. s. 12). These peculiarities of English law do not concern us here. The second branch is in itself elementary, but arrangements for transferring debts from the members of an old firm to a new firm are not uncommon and, if assented to by the old creditors, may constitute a complete novation. Where the business is carried on continuously, the creditors knowing of the change both the assumption of the existing debts by the new partners and the assent of the creditors to accept them as debtors and to discharge the retiring partners will be rather easily inferred (x). But an agreement between the old partners and an incoming partner that he shall be liable for existing debts does not of itself make him liable to existing creditors of the firm (y). Mere continuance in an existing transaction or account, of the usual course of business with the

(t) *Faulstich v. The Credit Bank of India* (1914) 16 Bom. L. J. 730, 27 I. C. 335

(w) *Kendall v. Hamilton* 4 App. Cas. 501, 1 A. s. 9

(x) *Osse v. Flower* (1866) 1 P. & F. C.

27, 40, 44

(y) *Russell Engineering Works v. Kanara Transport Co.* (1926) 41 M. L. J. 93, 94 I. C. 257; A. I. R. 1926 M. L. 1138 (elementary in English law)

inaccurate usage has been very common, and perhaps it is past criticism. As regards the word "share" used in this section it has been held by the Judicial Committee that it is no more than a right to participate in the property of the firm after its obligations have been satisfied (rrr). The legal title or interest in partnership property will, as a rule, be found to be in the partners jointly, but that is quite another matter.

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In England an infant partner who continues to act as a member of the firm after his full age, or, having acted as such during his minority, does not disclaim, is answerable for debts of the firm contracted since his majority, because he is at least an ostensible partner. But he is not conclusively held to ratify obligations contracted during his minority (t). The present section, by including such obligations, has distinctly enlarged the creditor's rights. As regards a joint Hindu family firm it has been held that a member of the family on attaining majority does not necessarily become personally liable for debts contracted in the joint family business during his minority (u).

- (rrr) *Singam Charan Mandal v Krishnaiah Tanerji* (1922) L. R. 47 I. A. 108, 49 Cal. 560, 67 I. C. 124.
- (s) *J. J. J. v. V. J. J.* (1878) 7 C. D. 718, *J. J. J. v. J. J. J.* (1878) 20 L. R. 707, 777, 778. *Cree v. J. J. J.* (1878) 10 C. D. 523. *Singam Charan Mandal v. Tanerji* (1917) 42 Cal. 25, *K. J. J. v. J. J. J.* (1917) 42 Cal. 25, 43 I. C. 488, 45 I. C. 167, *Singam Charan Mandal v. Tanerji* (1912) 35 Cal. 692, 11 I. C. 71, *Narain Doss J. J. J. Brothers* (1917) 47 I. C. 45.
- (t) *Cole v. Harrison* (1841) 7 B. & A. 117, 17, 21 B. & A. 314.
- (u) *Official Assignee of J. J. J. v. J. J. J.* (1918) 41 Cal. 11, 41 I. C. 250.

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**249.**—Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership, but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner

**Partner's liability for debts of partnership**

**Nature of partnership liabilities**—The first branch of this section represents what was supposed to be the rule of equity in England before the House of Lords decided, in 1879, that a partner during his lifetime is not severally liable for debts of the firm, but only jointly with the other partners (w) though a deceased partner's estate can be made severally liable and liability for wrong or fraud committed in the course of partnership business is also joint and several (P A s 12) These peculiarities of English law do not concern us here The second branch is in itself elementary, but arrangements for transferring debts from the members of an old firm to a new firm are not uncommon and if assented to by the old creditors may constitute a complete novation Where the business is carried on continuously the creditors knowing of the change both the assumption of the existing debts by the new partners and the assent of the creditors to accept them as debtors and to discharge the retiring partners will be rather easily inferred (x) But an agreement between the old partners and an incoming partner that he shall be liable for existing debts does not of itself make him liable to existing creditors of the firm (y) Mere continuance in an existing transaction or account of the usual course of business with the

(v) *Fa ulbhoy v The Credit Bank of India* (1914) 16 Bom L R 730 27 I C 335

(w) *Kendall v Hamilton* 4 App Ca 504 P A s 9

(x) *Rolfe v Flo cer* (1866) 1 R 1 P C

27 40 44

(y) *Russa Engineering Works v Kanara Transport Co* (1906) 41 Mad 930 98 I C 257 A I R 19 6 Mad 1138 (elementary in English)

firm with notice of the death or retirement of a partner will not amount to a novation (2) There must be a distinct new transaction amounting to a new contract with the surviving or remaining members of the firm (a)

Section 17 of the English Act deals more explicitly with this matter, and see more as to assuming liability by novation in the commentary on s 62, p 347, above, where several of the cases cited relate to a change in the members of a partnership, though there is nothing peculiar to the contract of partnership in the principle applied

The obligations for which a partner is liable under the first branch of the present section include whatever is incidental to an entire contract which he authorised, expressly or in the usual course of business, while he was still in the firm A retainer given on behalf of a firm to a solicitor forms one continuing contract for the conduct of the action, and a partner, known or unknown to the solicitor, who leaves the firm while the action is pending is liable for the costs incurred under the retainer after as well as before his retirement (b) This is the case of actual, not ostensible, continuing authority, and has nothing to do with estoppel, and therefore the creditor's knowledge or belief as to the members of the firm is immaterial

Though a contract may be entered into by one partner in his own name only, his co partner will be liable to be sued on the contract, though not known to the other party at the date of the contract to be a partner, if the contract was in fact signed by the partner as agent of the firm (c), and oral evidence is admissible to show that the contract was so signed (d) The reason of the leading case is general and applies to all undisclosed principals

**250.**—Every partner is liable to make compensation to

third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

(1) *The Herald* (1843) 7 Ch 420 (fresh deposit not taken for balance after drawing on old post account)

(2) *The Herald* (Nov 2) (1844) 2 Ch 273 (draw for from current to old post account)

(3) *Curtis v. Leach* (1847) 2 Q B 288 (C A)

(4) *Leckham v. Drake* (1841) 9 M & W 71 (old P C 178)

(5) *Leckham v. Drake* (1841) 9 M & W 71 (old P C 178) This case is quite consistent with the principle of s 61 and 62 of the Indian Contract Act for what the partner

Ground of liability, usure of firm, how material.—The principle of this section is a branch of the universal rule that every one must answer for the acts and defaults of his servants or agents in the course of their employment. For the general illustration of this rule the text books on the Law of Torts may be consulted. As regards the application of it now before us the chief difficulty that occurs in practice is that of knowing whether the neglect or fraud of a partner really took place in the management of the business of the firm "or was only his own particular wrong for which his position in the firm gave him an opportunity (c). Where the default consists as it usually does in the misappropriation of money which a customer or client was misled to entrust to the firm it is material to consider whether it ever came into the firm's custody, for in this case the firm is liable for misappropriation by a partner, whether he was the partner originally trusted or not and whether he acted in the exercise of apparently regular authority or not (P. A. s. 11). Further the question whether a partner was acting on behalf or with the ostensible authority of the firm can seldom be answered except by reference to the expectations created either by the special usage of that firm or by what is usual in that kind of business generally. Depositing securities with a banker for safe custody will make his firm responsible for a misappropriation of them, but putting money in the hands of one member of a banking firm to be invested at his discretion will not, for the former transaction is within the scope of what bankers in England habitually do for their customers the latter is outside it (f). Similar distinctions hold where solicitors are employed in money matters. Receipt of money with instructions to invest it in a specific manner binds the firm as being in the ordinary way of solicitors' business (g) but if the instructions are general to invest at the solicitor's discretion it does not (h). But a particular firm may widen its responsibility by habitually undertaking particular kinds of business for its clients (i).

exclude is admission of oral evidence to alter or add to the terms of a contract and the question who the contracting parties are is not a term of a contract

(c) See *M. Nash & Co. v. Mull & Co.* (1908) 12 C. W. N. 716 at p. 719

(f) Contrast *Clayton & Case* (1816) 1 M. & C. 579 15 R. 1 161 with *B. & J.*

*v. Co. of Jersey* (1841) Drew 143 100 R. R. 51

(g) *Bla. v. Brodie* (1847) 2 H. 301 71 R. R. 213

(h) *Hartman v. Johnson* (1853) 21 & B. 61 95 R. R. 49

(i) *Rhodes v. Mules* [1895] 1 Cl. 31 C. A.

A firm may also be liable for money which has come into its funds by the irregular or fraudulent act of either a partner (j) or an agent who is not a partner (k) and this whether the act was in the ordinary course of business or not, at all events if the partners knew or might have known of the payment and its source. But this does not really depend on anything specially belonging to the law of partnership.

This section does not in terms cover the case of a partner committing, in the supposed interest of the firm, a wilful wrong other than fraud, against a third person, but it cannot be doubted that in such a case the firm may be liable under the wider principle mentioned above. In a modern English case one of two partners bribed the clerk of the plaintiff, who was a competitor of the firm, to disclose certain information as to the plaintiff's operations which as between him and his employer was confidential, it was in the course of the firm's business to obtain such information by proper means. Both partners were held liable to the plaintiff (l).

It has been said in the Bombay High Court that a malicious prosecution by the managing partner of a firm does not render the other members of a firm liable in damages unless it is shown that the firm was in some way or other concerned in the prosecution and had instigated it (m). The result in this particular case may well be right, on the ground of want of authority, either general or special and the language of the Court may have been appropriate in the circumstances, but it is submitted that this cannot be relied on as a general test. If a prosecution was undertaken on behalf of a firm by a member of it (or any other agent) having general authority to prosecute on behalf of the firm in a proper case, if the prosecutor was acting with a view however perverse or erroneous to the interest of the firm and not merely for his private purposes, and if the prosecution was in fact malicious in the sense of being undertaken without reasonable cause and in order to damage a person obnoxious to the firm rather than to a lance justice then it is conceived, the partners in the firm would be liable, according

(j) *Mitchell v. Keeling* (1844) 1 B. & C. 185, 131 E.R. 1171.  
(k) *Hutchinson v. Murray* (1841) 1 B. & C. 185, 131 E.R. 1171.  
(l) *W. & A. v. W. & A.* (1841) 1 B. & C. 185, 131 E.R. 1171.  
(m) *Hutchinson v. Murray* (1841) 1 B. & C. 185, 131 E.R. 1171.

(n) *W. & A. v. W. & A.* (1841) 1 B. & C. 185, 131 E.R. 1171.  
(o) *Hutchinson v. Murray* (1841) 1 B. & C. 185, 131 E.R. 1171.  
(p) *Hutchinson v. Murray* (1841) 1 B. & C. 185, 131 E.R. 1171.

to principle and the English authorities, whether at the time they knew anything of the prosecution or not (n)

Wrongful employment of trust property by a trustee in a business in which he is a partner is specially dealt with by the Trusts Act, 1882, s. 67, with which compare P. A. s. 13.

**251.**—Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose (o).

*Exception.*—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them. no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement (p).

#### Illustrations

(a) A and B trade in partnership, A residing in England, and B in India. A draws a bill of exchange in the name of the firm. B has no notice of the bill, nor is he at all interested in the transaction. The firm is liable on the bill, provided the holder did not know of the circumstances under which the bill was drawn.

(b) A, being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bill (q).

(c) A. and B. carry on business in partnership as bankers. A sum of money is received by A on behalf of the firm. A does not inform B of such receipt, and afterwards A appropriates the money to his own use. The partnership is liable to make good the money.

(d) A. and B. are partners. A, with the intention of cheating B, goes to a shop and purchases articles on behalf of the firm, such as might be used in the ordinary course of the partnership business, and converts them to his

(n) This conclusion seems to follow a fortiori from the rule, now settled (*Citizen's Life Assurance Co v Brown* [1904] A C 423), that a corporation may be sued for malicious prosecution.

(o) As to the effect of acknowledgment by a firm within this section, *cp Bengal National Bank v Jatindra Nath Mazumdar* (1928) 56 Cal 556, 121 I C 741 (mainly on Limitation Act).

(p) There is nothing in Hindu law to put the younger of two Hindu brothers in partnership in a position of authority

inferior to the elder's. *Ghulam Mohammad v Sohna Mal*, 101 I. C 742, A I R 1927 Lah 385. Members of a joint Hindu family carrying on a business are generally in the position of partners as regards the customers. *Debi Dayal v Baldeo Prasad* (1928) 50 All 982, 111 I C 143; A I R 1928 All 491.

(q) "For it is no part of the ordinary business of a solicitor to draw, accept, or endorse bills of exchange." *Lindley*, 181.

own separate use there being no collusion between him and the seller. The firm is liable for the price of the goods. [*Bond v Gibson* (1808) 1 Camp 185, 10 R R 66.]

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**Question as to necessity**—This section lays down the general rule of the partners' responsibility for partnership affairs transacted in the ordinary course. It is not easy to see why it follows instead of preceding a series of sections dealing with various more special and less usual kinds of liability. In England the corresponding enactment (P. A. s. 5) more boldly says that every partner is an agent of the firm and of his other partners, and this may be preferable, but the result is the same. In one respect the powers of a partner are perhaps extended beyond the limits set by the common law. The only necessity which the English authorities recognise as conferring authority is the necessity of carrying on the business in the usual way. Extraordinary occasions will not confer extraordinary power on a partner or manager. "a power to do what is usual does not include a power to do what is unusual however urgent" (r), and a firm whose usual course of business did not require or include borrowing money has been held "not liable for money borrowed by its agents under extraordinary circumstances, although money was absolutely necessary to save the property of the firm from ruin" (s). "There is no rule of law that an agent may, in a case of emergency suddenly arising raise money and pledge the credit of his principals for its repayment" (t) nor any English authority giving a partner greater power in this behalf than any other agent. But the words of the present section "necessary for carrying on the business of such a partnership as that of which he is a member" may be read and it seems the more natural reading as including what is necessary in the circumstances of the special occasion and not as confined to what is necessary in the usual course of business. It may be doubtful whether this point was really considered by the framers of the Act, at all events it would be desirable if the Act is ever revised to make it quite clear one way or the other.

**General presumptions of authority in partnership affairs**—Apart from the case of extraordinary necessity, which has not often to be

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(r) 11 R R 173 180 approved by M & W 211 180  
 (s) 11 R R 173 180 approved by M & W 211 180  
 (t) 11 R R 173 180 approved by M & W 211 180  
 (u) 11 R R 173 180 approved by M & W 211 180

considered, and subject to the Exception (of which later), the test of an act binding the firm is whether it is usual in that kind of business. Particular firms may have their own usages, but a considerable number of rules of common application have become settled in practice. They were summed up by Story, and his exposition was approved by the Judicial Committee many years ago.

“The general power of partners in ordinary trading partnerships, and the restrictions upon such powers appear to us to be stated with great accuracy by Mr Justice Story in his treatises on Partnership and on Agency, and we willingly adopt his language. In the latter of these works (Chap VI, ss 124 and 125) the law is thus stated s 124 ‘Every partner is, in contemplation of law, the general and accredited agent of the partnership, or, as it is sometimes expressed, each partner is *præpositus negotiis societatis*, and may, consequently, bind all the other partners by his acts in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property, he may buy goods on account of the partnership, he may borrow money, contract debts, and pay debts on account of the partnership, he may draw, make, sign, endorse, accept, transfer, negotiate, and procure to be discounted promissory notes, bills of exchange, cheques, and other negotiable paper in the name and on account of the partnership’ S 125 ‘The restrictions of this implied authority of partners to bind the partnership are apparent from what has been already stated. Each partner is an agent only in and for the business of the firm, and, therefore, his acts beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm bind it when the other party to the transaction is cognisant of, or co operates in, such breach of duty.’

Their Lordships went on to say —

“That, in ordinary trading partnerships, the power of borrowing money for partnership purposes exists, and that bills or notes given by one of the partners in the partnership firm for money so borrowed will bind the firm, is too clear to require any authority’ {u}

The principles stated above were followed in a Bombay case where it was laid down that a firm is a trading firm if its business consists in buying and selling, also that in a trading firm no duty is

Another case more expressly provided for in the English Act is that of a partner purporting to bind the firm in a matter, on the face of it, outside the firm's usual business. P. A. s. 7 enacts that "where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners, but this section does not affect any personal liability incurred by an individual partner." This is really contained in the authorities referred to above (pp. 564, 565). The principle is applicable in the case (among others) of a partner raising money on the credit of the firm in such circumstances that the lender knows the loan to be intended for the borrower's private use and not for partnership purposes. In such a case the separate creditor must know that the partner is acting outside his normal authority, and therefore he cannot hold the firm liable unless there is in fact express authority from the other partners (s). Will reasonable belief in the existence of express authority be enough to justify the creditor in holding the firm liable? On principle it would seem not, except so far as that belief may have been induced by the conduct of all or some of the other partners, in which case those who have so acted may well be liable personally, having in effect held out the borrowing partner as authorised. But "the mistaken belief that the one partner had that authority" (to appropriate money coming from partnership funds to his private account) "cannot prejudice the right of the other, if the other did nothing to induce such a belief" (t). Similarly an indorsement of a negotiable instrument by one partner in the name of the firm, but without authority and for his own private purposes, confers no title on an indorsee having notice of the purpose and no reason to believe that there is authority (u).

Generally it must be understood that partners known or unknown are bound only by what is done on behalf of the firm, even if the firm has the use of money borrowed by a partner in his own name, this is at most evidence but not conclusive to show that the borrowing was in fact on account of the firm (v).

(s) *Kendall v. Well* (1871) 11 Ex. Cl. 111. See also at p. 563 per Mellish J. See also *Re T. per T. J. at p. 254*.

Ex. 210 Ex. Cl.

(t) *The Channel & Sea Insurance Co. v. The* (1973) 28 C. W. N. 81. See also *Re T. per T. J. at p. 254*.

Ex. 211 Ex. Cl.

(u) *Re T. per T. J. at p. 254*.

(v) *Re T. per T. J. at p. 254*.

**252.**—Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all of them, which consent must either be expressed, or be implied from a uniform course of dealing (*w*).

Annulment of contract defining partner's rights and obligations

#### Illustration

A, B, and C, intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the net profits arising from the partnership business shall be equally divided between them. Afterwards they carry on the partnership business for many years, A receiving one half of the net profits, and the other half being divided equally between B and C. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits.

**Variations by consent.**—This is elementary law. Perhaps the last few words are the most important.

“Partners, if they please, may, in the course of the partnership, daily come to a new arrangement for the purpose of having some addition or alteration in the terms on which they carry on business provided those additions or alterations be made with the unanimous concurrence of all the partners” (*x*).

Thus a standing practice of the firm as to the mode of valuing assets (*y*) or adjusting profit and loss account (*z*) is binding until altered by consent, whether part of the original agreement or not.

**253.**—In the absence of any contract to the contrary the relations of partners to each other are determined by the following rules —

Rules determining partner's mutual relations where no contract to contrary

(1) all partners are joint owners of all property originally brought into the partnership stock or bought with money belonging to the

(*w*) This section does not interfere with a judge's exercise of discretion under s. 254, which will not be reviewed if not shown to be capricious or to disregard any legal principle. *Rekhat un Nissa Begum v. Price* (1917) L. R. 45 I. A. 61, 42 Bom. 380, 43 I. C. 568.

(*x*) *Lord Langdale M.R., England v. Curling* (1844) 8 Beav. 129, 133, 68 R. R. 39, 42.

(*y*) *Coventry v. Barclay* (1864) 3 D. & G. J. & S. 320.

(*z*) *Ex parte Barber* (1870) L. R. 5 Ch. 687.

partnership, or acquired for purposes of the partnership business. All such property is called partnership property. The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss :

- (2) all partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership :
- (3) each partner has a right to take part in the management of the partnership business :
- (4) each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business :
- (5) when differences arise as to ordinary matters connected with the partnership business, the decision shall be according to the opinion of the majority of the partners ; but no change in the nature of the business of the partnership can be made, except with the consent of all the partners :
- (6) no person can introduce a new partner into a firm without the consent of all the partners :
- (7) if from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members :
- (8) unless the partnership has been entered into for a fixed term, any partner may retire from it at any time :
- (9) where a partnership has been entered into for a fixed term, no partner can, during such term, retire, except with the consent of all the partners, nor can he be expelled by his partners for any cause whatever, except by order of Court :
- (10) partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner.

It must be well observed that all the rules laid down in this section have effect only so far as they are not excluded by any agreement of the partners, which agreement need not be formal or even express. We shall now consider the sub-sections in order.

**Sub-s (1): Partnership property.**—Property belonging to the partners or to one of them does not become partnership property merely by being used for the purposes of the business (a). It will become so only if the partners show an intention to make it so, as where the owner of a mill agrees to carry on the manufacture in partnership with others and is credited in the accounts of the firm with the value of the mill and plant as his capital. In that case both the mill and any subsequent additions to the site and plant are partnership property, and any increased value obtained for them on a sale of the business is divisible as partnership profits (b). Similarly where in subsequent dealings between the partners one partner's share in the land and business is treated as an undivided whole (c). The nature of the business may also be material (c).

**Goodwill.**—Partnership property generally includes goodwill, so far as it exists and has exchangeable value (d). Nothing is said either in this or in the English Act about the incidents of goodwill, probably because, although they often have to be considered in partnership cases, they may no less be material in other cases of a business being transferred by sale or devolution of the trader's interests. "Goodwill" is properly a commercial term signifying the value of the business in the hands of a successor, so far as increased by the continuity of the undertaking being preserved in the shape of the right to use the old name and otherwise. It is something more than the mere chance or probability of old customers maintaining their connection, though this is a material part of the practical fruits, it may be summed up as "the whole advantage, whatever it may be, of the reputation and connection of the firm" (e). But a series of

(a) *Lindley* 415 416, *Davis v Davis* [1894] 1 Ch 393

(b) *Robinson v Ashton* (1875) 1 R 20 Eq 25

(c) *Waterer v Waterer* (1873) L R 15 Eq 402

(d) *Letj v Walker* (1870) 10 Ch Div 436 446. On dissolution by one partner's

death the goodwill of the business would be an asset and might well be the most valuable asset of the partnership. *Re David and Matthews* [1899] 1 Ch 378 382 per *Romer J*. *Jennings v Jennings* [1898] 1 Ch 378

(e) *Lord Macnaghten* *Trego v Hunt* [1896] A C at p 24

decisions has now given it a pretty definite legal character. And of goodwill conveys to the buyer (in the absence of any special provisions) the exclusive right of representing himself as the successor to the business and also that of using the old name provided that the seller is not thereby exposed to liability as an ostensible partner (f). Whether there is any substantial risk of which he can complain is a question of fact (g). It includes the benefit of any covenant by a partner not to carry on for a fixed time any business competing with that of the firm (h). It does not bind the seller not to compete with his successor (i) but he must not specially solicit the customers of the old firm (j) even those who may of their own accord have continued to deal with him (k).

The importance of goodwill as compared with other assets of a firm necessarily varies according to the nature of the business. In some kinds of business it may be inappreciable (l).

**Assets benefit of contracts**—A contract on the part of a limited company such as occurred in *Baclubai v. Slamji* (m) to continue to employ a firm as its agents is not a valuable asset in which the legal representative of a deceased partner of the firm would be entitled to participate. The profits in respect of such a contract would be derived entirely from and would depend absolutely upon the services of the surviving partners and it is not one in respect of which any liability could be incurred by the estate of the deceased partner. But contracts of the character found in *Ambler v. Bolton* (n) and *McClellan v. Kennard* (o) constitute valuable assets being in their nature such as would have rendered the estate of the deceased partner liable in the event of loss.

**Partner's share**—The only exclusive measure of a partner's share is what he is entitled to claim on the termination of the partnership or could at any given time claim if the partnership had at that time

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| (f) <i>Thompson v. Ash</i> (1855) 1 C. D. 1 | (j) <i>Trevelyan v. Hunt</i> (1855) 1 C. D. 1 |
| (g) <i>Deane v. Maule</i> (1855) 1 C. D. 1  | (k) <i>Clifford v. Bland</i> (1855) 1 C. D. 1 |
| (h) <i>Thompson v. Ash</i> (1855) 1 C. D. 1 | (l) <i>See v. See</i> (1855) 1 C. D. 1        |
| (i) <i>Thompson v. Ash</i> (1855) 1 C. D. 1 | (m) <i>See v. See</i> (1855) 1 C. D. 1        |
| (j) <i>Thompson v. Ash</i> (1855) 1 C. D. 1 | (n) <i>See v. See</i> (1855) 1 C. D. 1        |
| (k) <i>Thompson v. Ash</i> (1855) 1 C. D. 1 | (o) <i>See v. See</i> (1855) 1 C. D. 1        |
| (l) <i>Thompson v. Ash</i> (1855) 1 C. D. 1 |   |

be wound up and its assets realised and distributed. There is no section in this Act corresponding to P A s 44 and providing for the order of distribution, for s 262 corresponds only to the English rule in bankruptcy, but as P A s 44 was not intended to alter the effect of existing English authority, nor does any such intention appear in this part of the Contract Act, the rules are probably the same in England and in British India. A partner's share does not include advances made by him to the firm beyond his contributions of capital. Such advances, though postponed to the claims of outside creditors, are as between the partners preferred debts from the firm to the lending partner, and repayable in priority to payment out of capital. In England they carry 5 per cent interest from their date (P A s 24, sub s (3), Lindley, 478), and subject to any local reason for varying the rate, we presume the same rule would be applied in India.

**Sub-s (2) : Share in profits and losses** —As this section lays down a presumption in the case of partners as to equality of shares, the burden of proof lies on the party who sets up an agreement to the contrary (p).

In England, and presumably here, losses and deficiencies of capital are to be made up by contribution from the partners in the same way as other losses namely (in the absence of any more specific agreement) in the proportion in which the partners were entitled to share profits, whether that is or is not the same as the proportion of their capital (q). The assets, after being made up by such contribution, are to be applied, subject to satisfaction first of outside creditors and then of partners' advances, "in paying to each partner rateably what is due from the firm to him in respect of capital account being taken of the equal contributions [in the case before the Court profits were divisible in equal shares] to be made by him towards the deficiency of capital" (r). That is, his claim for capital is "the value of his original contribution diminished by his share of

(p) *Jadobram v Bulloram* (1899) 26 Cal 281, *Keshav v Rayapa* (1875) 12 B H C 165, 171. These cases are not noticed in *Harchand Singh v Gurdip Singh* (1926) 8 Lah 241, 102 I C 217, A I R 1927 Lah 485 which seems hard to reconcile with them though it may well be that rules as to burden of proof between independent litigants do

not always fit the case of partners

(q) *Lowell v Lowell* (1869) L R 7 Eq 538 which P A s 44 was doubtless intended to confirm. *Bnney v Mutrie* (1886) 12 App Ca 160 163 J C where the rule is treated as clear.

(r) *Garner v Murray* [1904] 1 Ch 57, 60

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| (f) <i>Talman v. Sherrin</i> (1880) 11 C. 1 D. 1     | (j) <i>Teece v. Hunt</i> (1888) 13 C. 1                 |
| (g) <i>Leitch v. M. H. Co.</i> (1881) 11 C. 1        | (k) <i>C. v. L. v. M. H. Co.</i> (1881) 11 C. 1         |
| (h) <i>B. v. H. v. H. H.</i> (1888) 11 C. 1          | (l) <i>See Stuart v. L. v. M. H. Co.</i> (1888) 11 C. 1 |
| (i) <i>T. v. M. H. v. J. v. M. H.</i> (1888) 11 C. 1 | (m) (1888) 11 C. 1                                      |
| (j) <i>C. v. L. v. M. H. Co.</i> (1888) 11 C. 1      | (n) (1888) 11 C. 1                                      |
| (k) <i>C. v. L. v. M. H. Co.</i> (1888) 11 C. 1      | (o) (1888) 11 C. 1                                      |

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(r) *Garner v Murray* [1904] 1 Ch 57, 60.

loss" (sub s (1), p 701, above), and that share is equal if his share of profits would have been equal (sub s (2)). Our Act appears to be in strict accordance with English authorities though less fully expressed than the English Act.

If one partner is insolvent, the burden of his contribution to a loss of capital is not to be thrown on the solvent partners after debts to outside creditors have been paid. A, B and C are partners who have contributed capital in unequal shares but share profits equally. On winding up the business the capital after satisfying the external debt and advances made by A and B is found to be deficient by Rs 15,000. A and B are solvent and C is insolvent. A and B have to contribute only Rs 5,000 each not Rs 7,500. The remaining capital increased by these contributions, is divisible between A and B in the proportion of their original shares of capital C remaining in debt to the firm. There is nothing in P A s 44 ' to make a solvent partner liable to contribute for an insolvent partner who fails to pay his share. (s)

**Partner's right to indemnity and contribution**—These rights which are not expressly laid down in the Contract Act are stated in P A s 21 sub s (2). In addition to the ordinary claim of an agent to be indemnified (see s 222 p 623 above), a partner may be entitled to reimbursement for what may be called emergency or salvage expenses incurred by him personally on behalf of the firm in circumstances of extraordinary requirement. Money payments to satisfy debts of the firm are the commonest examples under this head. There may also be urgent and necessary payments required for keeping the business of the firm in existence as a going concern, thus in a mining business it may be necessary to sink a new shaft promptly to get at unexhausted minerals. Claims of this kind are somewhat anomalous and justified only by necessity and the Court is not disposed to extend their scope (t). But when extraordinary expenditure of this kind is once found to be authorized by necessity the necessity found to exist is the only measure of the amount which can be allowed as proper. There is no rule whereby it is limited to the nominal capital of the concern (u). No recent decisions have been found on the topic and in fact the English reported cases mostly if not wholly are in the early period

(t) *Carr v. Murray* 10 T. R. 541. (1853) 4 D. M. & G. 10. 11. 12.

(u) *Ex parte B. & S.* 11 B. & C. 1. (1851) 11 D. M. & G. 1. 11. 12.

(v) *Ex parte B. & S.* 11 B. & C. 1. 11. 12.

of joint stock companies and under conditions which model in company law has superseded. Only one case on a private partnership is known to the writer which illustrates the principle, and there the point is not very clear or conspicuous (r).

**Sub-s. (3), (4) : Right and duty of partners to attend to business.**— It is quite common in practice to provide by express agreement that this or that partner need not, sometimes even that he may not take any active part in the business, and also for the payment of salary to a managing or active partner. Any such salary will of course rank, in taking accounts as between the partners, as a debt from the firm. The latter part of sub-s. (4) does not touch the case of undue labour and trouble being imposed on one partner by another's wilful neglect of the business to which he ought to attend. A partner on whom the whole conduct of the business has been thrown in this manner is entitled to compensation (w).

**Sub-s. (5) : Power of majority.** This power though not in itself of a judicial kind is subject to the rule of natural justice which governs quasi-judicial powers of private persons and bodies in general. Every partner must have an opportunity of being heard, and the decision must be made in good faith with a view to the collective interest of the firm (x). Being so made, it is conclusive, as in other analogous cases.

Not only the nature of the business, but the place where it is carried on, may not be varied without the consent of all the partners (y).

**Sub-s. (6) : New partners ; assignment of share**— The effect of this sub-section " is not to render an assignment of a share in a partnership concern illegal or void as between the parties to the assignment, but only so far void as between those parties and the other partner or partners as to cause [i.e. give cause for] (z), an immediate dissolution

(r) *Burdon v. Barkus* (1862) 4 D. L. & J. 42, 135 R. R. 19.

(w) *Airey v. Borham* (1861) 23 Beav. 620, 131 R. R. 736, *Krishnamachari v. Sankaraj Sah* (1921) 22 Bom. L. R. 1343, 57 I. C. 713, P. C.

(x) *Const v. Harris* (1823) 1 & R. 496 525, 24 R. R. 108 132.

(y) One partner alone cannot even renew a lease of the site where the

business, or part of it, has been carried on. *Clements v. Morris* (1878) 8 Ch. Div. 129.

(z) The partnership is not *ipso facto* dissolved but the objecting partner or partners can sue for dissolution. *Dhanraj Shetaji v. Gulibel and Pana* 87 I. C. 812, A. I. R. 1925 Bom. 347 27 Bom. L. R. 409.

of the partnership. In other words, one partner cannot by assigning his share make any one else a partner in his stead with his co-partners, and therefore upon his assigning his share the partnership ceases to exist, unless the other partners consent to accept the purchaser as a partner in the place of the latter. If they do so consent, the partnership may continue to be carried on as before. If they do not consent the plaintiff would upon the dissolution (a) have a right to sue, not as a partner, but as an assignee of the rights of his assignor in the partnership property, for an account of that property, and for such a distributive share as belonged to his assignor" (a)

Express power for a senior or principal member of a firm to introduce one or more new partners, named or not named, under agreed conditions, is in fact constantly given by partnership articles. A person duly nominated under such a power acquires rights in the partnership property which the Court will enforce by way of appropriate specific relief (b) though it cannot enforce an agreement to enter into partnership, because the foundation of partnership is mutual confidence, which the Court cannot supply where it does not exist.

Though a member of a joint Hindu family cannot sue for an account of the profits of a partnership which is alleged to be joint family property and for an award to him of his share therein (c) he is entitled to an injunction if he is excluded from the management of the family business (d). But the relief in such a case is granted not on the specific rules as to the law of partnership but upon the general principle that one member of an undivided Hindu family cannot be ousted by others from any item of family property (e).

**Sub-s (7) - Dissolution of firm** —It is often desirable and in practice it is not uncommon to provide by agreement that the death or retirement of one member from a partnership of several shall not dissolve the contract as between the others.

(a) *Juggut Chander v Jads Nath* (1884) 10 Cal 669. In England such an assignee is not now entitled to an account during the continuance of the partnership. And such was the letter of even before the Act. 1. A. 31 for the workings of which see *Walter v Drysdale* [1901] 1 Ch 2. *Jade v Jadey* [1881] 2 Ch 670. *In re General's Trusts* [1883] 1 Ch 236.

(b) *Dyane v Re* [1900] 1 Ch 71 C. A.  
(c) See the decision referred to in the local Joint Hindu Family Bill p. 678 above.  
(d) *Chand v. Annas* (1884) 23 B. 111.  
(e) See *Walter v Drysdale* [1901] 1 Ch 2. *In re General's Trusts* [1883] 1 Ch 236.

**Sub-s. (8) : Partnership at will : tacit dissolution.**—As to the continuation of a partnership for a term after the term has expired, see s 256

An intention to dissolve partnership may be inferred from circumstances showing that a partner has in fact abandoned his interest in the concern, but no positive rule can be laid down as to what evidence will suffice. However precarious or speculative the subject matter of a partnership may be, it is a matter of inference to be drawn from the facts of each case whether or no there has been abandonment, or loss of interest by laches (*f*)

**Sub-s. (9) : Expulsion**—Power to expel a partner may be conferred by express agreement, but, even more than the ordinary powers of a majority, it must be exercised with regard to the rule of natural justice mentioned under sub s (5). Reasonable warning and opportunity of explanation must be given (*g*). An irregular expulsion being wholly inoperative, the person against whom it is directed does not cease to be a partner, he may claim reinstatement in his rights (*h*), and, not being legally deprived of anything, cannot sue for damages (*i*). An option given to one member of the firm to determine the partnership by notice if he is dissatisfied with the business is not analogous to an expulsion clause, but purely discretionary (*j*). Sometimes power is given to expel a partner for specified kinds of misconduct. In case of dispute the Court has to decide according to the ordinary rules of construction whether the facts are within the terms of the power (*k*)

**Sub-s (10) : Dissolution by death**—See on sub s (7). Obviously A and B cannot be presumed to desire their partner C's executors to come into the firm, nor yet to be willing to continue the business in partnership without C. But since this sub section, like all the preceding ones, must be read with the words "in the absence of any contract to the contrary" (*l*) at the commencement of the section

(*f*) *Young Tha Huiyin v Mah Thein Myah* (1900) 28 Cal 53, L R 27 I A 189, *Sudarsanam v Narasimhulu* (1901) 25 Mad 149, 164

(*g*) *Barnes v Youngs* [1898] 1 Ch 414 90 R R 454

(*h*) *Blisset v Daniel* (1853) 10 Ha 493, 90 R R 454

(*i*) *Wood v Wood* (1874) L R 9 Ex 190

(*j*) *Russell v Fussell* (1880) 14 Ch D 471

(*k*) Professional misconduct in a firm of dentists *Clifford v Timms* [1908] A C 12. flagrant breach of duty as a partner includes conviction for fraud *Carmichael v Evans* [1904] 1 Ch 486

(*l*) The fact that a partnership is

partners may agree (as they frequently do) that on the death of any of them his nominee or legal representative shall be entitled to take his place. In the case of a power to nominate a successor on death it is necessary that there should be "a specific direction in that behalf either in express terms, or, at any rate, by a specific disposal of the deceased partner's interest in the firm." The will of a deceased partner, making a general bequest of his property, does not operate as an exercise of such a power (*m*).

**Custody of books**—Nothing is said in the present Act about the custody of the partnership books. In England they must be kept at the principal place of business of the firm, and every partner may inspect and copy them. P. A. s. 21 sub s. (9) (u). Where there is more than one place of business a properly framed partnership agreement will declare in express terms which is to be the principal one and where the books are to be kept. The right of inspection may be exercised by an agent provided that he is a fit person and undertakes, if required, not to use the knowledge thus obtained for any other purpose than the confidential information of his principals (o).

254.—At the suit of a putner the Court may dissolve the partnership in the following cases —

## When Court may dissolve partner ship

(1) when a partner becomes of unsound mind ( $p$ ) —

(2) when a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors (p)

entered into for a single adventure and therefore is to last till the termination of the adventure (cf. P. V. 3) does not imply a contra to the contrary. *Id. I Hal v. Temulira I I ntim* (a) I C. G. A. I R. 1-7 M. I. 11. 52 M. I. 1. 318

(iv)  $L$  is a Lie algebra over  $\mathbb{R}$  or  $\mathbb{C}$  with  $\dim L = 1$  and  $\dim \mathfrak{h} = 1$ .

(n) See also *Leicester v. Leicester* (1917) 118 C.A.S. 611, 118 C.A.S. 111 and *Levin v. Ingham* (1917) 118 C.A.S. 111.

( ) *Linear Algebra* (1981) 2(7) 51  
C. A. N. Steyn, *unpublished*

partner but self not at all be r  
strained from using or extract  
made in the exercise of a part of it  
for purposes of the other part of the  
interests of the other. *Troy Hunt* [1904]  
A.C. 100 (1st Div.)

(j) S. l. ex. tel. t. t. l. alve. H.  
particular f. y. f. t. A k k l n j h  
Mak i n j h v. l. s. n j t. r. l. k. s. l.  
l. u. I. C. 74. A. I. I. D. s. c. l. 71  
{ n. s. e. v. s. } J. j. l. t. k. s. l. t. H.  
electric v. t. n. n. y. H. o. j. e. t. k. m. d. (l. ) 3  
(a) 211. 11 I. C. 84. A. I. I. 1. 7  
(a) 271 (l. v. s.)

- (3) when a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person \*
- (4) when any partner becomes incapable of performing his part of the partnership contract
- (5) when a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners
- (6) when the business of the partnership can only be carried on at a loss

This section represents with substantial accuracy the established English practice, and P. A. s. 35 has followed it with some little specifying and amplification. In England a partner's bankruptcy works a dissolution without the action of the Court.

**Sub-s. (3) : Transfer of partner's share by operation of law.**—The share of a partner in partnership business is 'saleable property' within the meaning of s. 266 of the Code of Civil Procedure (q), and may therefore be attached and sold in execution of a decree against him (r). Such a case is within the spirit, if not the letter, of the present sub-section.

**Sub-s. (5) : "Gross misconduct."**—These words are perhaps not the most apt to cover all the circumstances in which "such a state of feeling may arise and exist between the partners as to render it impossible that the partnership can continue with advantage to either." It seems that in such a case either partner may claim a dissolution (s). The Indian Courts are not likely to decline jurisdiction, they might be astute, at need, to bring the facts within sub-s. (6). Persistent refusal or neglect to attend to the business is also ground for a dissolution (t).

**Sub-s. (6) : Business carried on at a loss**—When the business of the partnership cannot be carried on except at a loss, the Court may,

(q) Now Code of 1908 s. 60

(r) *Jagat Chunder v. Iswar Chunder* (1893) 20 Cal 693 Cp P. A. s. 23

(s) Lord Cairns, *Atwood v. Maude* (1868) L. R. 3 Ch. at p. 373. In *Ram Singh v. Ram Chand* (1920) 1 Lah. 6,

revd. 51 I. A. 154, 79 I. C. 944, A. I. R.

1924 P. C. 2, this question did not really arise, the partnership having been duly determined by notice.

(t) *Krishnamachariar v. Sanlarah Sah* (1920) 22 Bom. L. R. 1343, P. C., 57 I. C. 713



partner continues to carry on the business, the enemy partner is entitled to share the profits made after dissolution by the use of his capital, payment being of course suspended during the war (x)

**256.**— If a partnership entered into for a fixed term be continued after such term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissolvable at the will of any partner

P A s 27, which is slightly different in wording, but to the same effect, adds that continuance of the business without liquidating the partnership affairs is presumed to be a continuance of the partnership (y) The following provisions have been held applicable to the continuing relation of partners holding on after the term option for a surviving partner to purchase a deceased partner's share at a fixed valuation (z), an arbitration clause (a) The following have been held inconsistent with a partnership at will requirement of notice a certain time before retiring from the partnership (b), option to dissolve the partnership, in special circumstances, on special terms (c) The same rule applies where a deceased partner's representatives continue the partnership after his death without express agreement (d)

(x) *Hugh Stenenson & Sons v Aktien gesellschaft für Cartonnagen Industrie* [1918] A C 239

(y) Still there is a new agreement and therefore the benefit of registration for income tax purposes can be obtained after the expiry of the term only by executing a new deed *Krishna Aiyar & Sons v Commr of Income tax* (1928) 52 Mad 367, 115 I C 254, A I R 1929 Mad 67

(z) *Cox v Molloughby* (1880) 13 Ch D 863

(a) *Gillett v Thornton* (1875) L R 19 Eq 599

(b) *Featherstonhaugh v Fenuick* (1810) 17 Ves 307 11 R R 81

(c) *Clark v Leach* (1862) 32 Beav 14 1 Do G J & S 409 137 R R 247 *Watson v Haggitt* [1928] A C 127 107 I C 459 A I R 1928 P C 115 14 on the construction of a rather loosely drawn provision in articles for payments to be made to a deceased partner's estate by the surviving partner and is very remotely connected with this or any other section of the Contract Act

(d) *Haji Hedayetulla v Mah med Kamil* (P C 1923), 29 C W N 161 81 I C 525, A I R 1924 P C 93

the firm's irrespective of competition Breach of such an agreement however, does not make the partner breaking it liable for an account of profits (l) In fact, an agreement so expressed is only equivalent to the more usual form by which the promisor undertakes to give his whole time and attention to the partnership business

**260.**—A continuing guarantee given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guarantee was given

This section is practically a redrafting of 19 & 20 Vict c 9 (Mercantile Law Amendment Act, 1856) s 1, and has been adopted almost word for word in P A s 18, the original enactment (which was in affirmance of existing law) (m) being repealed by s 18

The agreement to the contrary required to displace the effect of this section must be clearly shown It is not implied in the mere fact that the guarantee is given to a firm whose name has ceased to describe its existing members, and is to secure the balance of a current account (n) Such an intention may be apparent from other circumstances A bond given to trustees to secure the faithful service of a clerk to an incorporated insurance society having a large number of members "some of whom might be changed before the wax on the bond was cold," was held enforceable without regard to the identity of the members for the time being, the purpose being clear and the interposition of trustees removing any formal difficulty about parties (o) A case of this kind can hardly occur in modern practice

The one Indian decision reported on this section is in a plain case A becomes surety to the firm of "N C Mookerji" for B's conduct as cashier to the firm The constitution of the firm is subsequently

(l) See to (s) last page

(m) There was a corresponding section in the old law of England that the constitution of the firm was not to be taken into account in determining the liability of the surety. See per Lord Hale in *J*

in the case cited

(n) *Eschewer v. Hall* (1854) 13 B & C 407

(o) *Holmes v. Wilson* (1860) 10 B & C 407

(p) 11 B & C 432

changed and its name is altered to 'N Mookerji & Son' A is not liable for B's defalcations subsequent to the change (*p*)

**261.**—The estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death

*Non liability of deceased partner's estate for subsequent obligations*

*Cp P A s 36 (3)* It is immaterial if the obligation was incurred towards a creditor who believed the deceased partner to be living and a member of the firm (*q*)

'It may be taken as a general proposition that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partners but a partner may authorise his executors to continue the business after his death and may thereby make his whole (*r*) estate liable to indemnify them for debts contracted in so doing (*s*) The principles applicable in these cases are really independent of the law of partnership and even the testator's authority may be dispensed with so as to give priority to the executors' claims by the assent of the creditors to the business being carried on (*r*)

The provisions of s 263 do not override the express provisions of this section, hence where money is borrowed by surviving partners to pay for and take delivery of goods ordered by the firm in the lifetime of the deceased partner the estate of the deceased is not liable for the debt All that the creditor is entitled to is a personal decree against the surviving partners and a decree against the partnership assets in the hands of those partners (*t*)

**262.**—Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of

*Payment of partnership debts and of separate debts*

(*p*) *Veel Comul Mookerjee v B pro Dass* 169 Nothing in the English Act affects the authority of this decision *Freund v Young* [1897] 2 Ch 401 408

(1901) 28 Cal 597 The only question really argued was whether the defendant was liable on an independent personal guarantee

(*r*) *Doutse v Corton* [1891] 1 A C 190

(*s*) *Lindley* 44

(*q*) *Houlton's Case in Devaynes v Noble etc* (1816) 1 Mer 509 616 15 R R 151

(*t*) *Seshi Armal v Iavarivan Chellar* (1918) 35 Mad L J 669 47 I C 908

even in the course of winding up to renew a promissory note in the name of the firm so as to bind the estate of the deceased partner. The contrary view (b) taken by the High Court of Bombay is it is submitted erroneous. But where a partnership is dissolved on the terms of one partner taking over the business and assets the partner who has taken them accordingly has no authority to bind the outgoing partner by making negotiable instruments in the name of the old firm (c).

A retiring partner may give special and larger authority, however if he thinks fit and this may rather be expected while the winding up of a business is actively proceeding. Leaving assets in a continuing partner's hands for the purpose of winding up the concern is different from turning over the whole future benefit and responsibility to him as a purchaser (d). The executors of a deceased partner are not entitled on dissolution of the partnership to join the surviving partners in the winding up but they have a right to inspect and challenge the accounts (e). An assignee of a partner's interest is not bound by a statement of account made without his knowledge after the assignment (f).

**Suit by a surviving partner for debts to firm**—The question whether the representatives of a deceased partner are necessary parties to a suit for the recovery of a debt which became due to the firm in his lifetime has been considered under s 15 (p 305 above).

**Use of partnership name**—A surviving partner while he has authority to act for the best interest of the business is bound not to act in such a manner as to destroy any part of its value. It is quite settled in our modern law that the goodwill (see pp 703-704 above) is an asset of the firm and does not as once supposed survive to the continuing partner alone. If, then, it is not permissible for a surviving partner to appropriate to himself the goodwill of the partnership business it follows that he ought not to do so and in case of necessity

(b) *Markanday v. Lennard* (1917) 41 C.L.R. 68  
 1 B.M. 111 837 840 40 I.C. 817  
 See also *Cl. at l. n. test. t. ret. p. 11*  
 above  
 (c) *H. v. S. v. S.* (183) 4 B. & A. 1  
 1 B.M. 111 127  
 (d) *S. v. H. v. S.* (1878) 4 M. & W.  
 (e) *S. v. S.* (1878) 4 M. & W.  
 (f) *L. v. S.* (1878) 4 M. & W.

would be restrained by the Court, pending a sale of the goodwill for the benefit of the partnership, from doing any act in excess of his rights which if not stopped, would enable him to obtain the goodwill or any part of it. For example, though a surviving partner is within his rights in carrying on a similar or rival business he could, in my opinion, be restrained from carrying on that rival business in the name of the partnership firm so as to lead to the belief that he was carrying on the partnership business, or so as otherwise to appropriate to himself the goodwill of that business" (g). Certainly one partner may be restrained from using the firm name or the firm's property to do business for his own exclusive profit pending the liquidation of the partnership affairs (h). After dissolution and liquidation of a firm there is no exclusive right to the use of the old name, unless it has been so agreed, but it must not be used so as to expose a former partner to liability on the ground of "holding out" (i). Whether there is any substantial risk of that kind is a question of fact in each case.

**Duties between continuing and outgoing partners**—Various and often complicated questions have arisen where a retiring or deceased partner's capital has been left in the firm's business without any settlement of accounts. Provision is made for these cases, in accordance with the result of a long series of authorities (j) in P. A. s. 42. If there is no special agreement the outgoing partner or his representatives may claim at his or their option "such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets" (but experience is not favourable to this method) or interest at 5 per cent. on the amount of the share (k). But the due exercise by the continuing firm of an option (such as is

(g) *Romer J. Re David and Matthews* [1899] 1 Ch. 378, 383, where it is further pointed out that certain earlier decisions apparently to the contrary are not now to be relied on.

(h) *Turner v. Major* (1862) 3 Giff. 442, 133 R. R. 162.

(i) *Burchell v. Wilde* [1900] 1 Ch. 551, C. A.

(j) The principal decisions are *Brown v. De Tastet* (1821) Jac. 284, 23 R. R. 59; *Crawshaw v. Collins* (1896) 2 Russ. 325, 26 R. R. 83; *Willett v. Blandford*

(1841) 1 Ha. 203, 58 R. R. 61, approved in *Simpson v. Chapman* (1853) 4 D. M. & G. at p. 171, 10<sup>o</sup> R. R. 70; *Hedderburn v. Hedderburn* (1850-6) 22 Beav. 84, 123, 111 R. R. 267, 290; *Turner v. Major* (1862) 3 Giff. 442, 133 R. R. 162; *Lye v. Foster* (1874) L. R. 7 H. L. 318.

(k) *Ahmed Musaj v. Hashim Ebrahim* (1915) L. R. 42 I. A. 91, 42 Cal. 914, 28 I. C. 710; *Mahomed Kamal v. Hajj Hedayetulla* (1921) 48 Cal. 906, 64 I. C. 861. See Indian Trusts Act 1882 s. 88, illust. (f).

often given by partnership articles) to buy out the share of the late partner excludes any further claim to an account of profits. The existence of such an option has no effect if it is not exercised in accordance with its terms. Further and more complicated questions may arise if a continuing partner is personally responsible as executor or trustee to the persons beneficially interested in the late partner's share, his liability in that capacity must be carefully distinguished from that which he may incur simply as a partner. Cases of this kind can hardly occur except where a deceased partner's capital has been disposed of by a will of the English type (l). The principle is "that a trustee or executor who uses trust-money in trade must account for the profits which he makes by that use of it" (m).

Apart from any such special relation as just mentioned, surviving or continuing partners are not, in the inaccurate phrase which at one time was current, trustees for an outgoing partner or a deceased partner's representatives. Whatever is due on that account is a debt and nothing else than an ordinary debt, "a debt accruing at the date of the dissolution or death", so P. A. s. 13 expressly declares in accordance with English law as settled more than a generation ago, and as such it is subject to the ordinary law of limitation of actions (n).

**264.**—Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.

**What notice required**—This section looks, on the face of it as if it had been intended to simplify the English rule and abolish its distinction between old and new customers of the firm, but authoritative interpretation is otherwise.

The English law requires that the old customers who are known to the firm as having dealt with it, shall have actual notice, which is commonly given by circular. But, as regards persons who have not dealt with the firm (or, in other words the general public), it is impossible in a large community to give any specific notice, and therefore as regards them the most effectual public notice is all that can be

(l) *1444 v. Foster* note (f) above is the leading authority. Cf. the Trusts Act II of 1850 s. 40 illustrate (i) and (ii). (m) *111 v. 111* at p. 20. (n) *Knox v. 130* (1850) L. J. 5 H. L. 654 see per Lord Westb. at p. 656.

required, for this purpose notice published in the *London Gazette* is sufficient (P A s 36) In India it has been contended that the present section lays down a different rule, namely, that persons dealing with a firm, whether old or new customers, are bound, in the absence of actual notice to them, by public notice of the dissolution. The High Court of Calcutta, however, held otherwise long ago (o), and this decision, having been generally followed, is now finally confirmed by the Judicial Committee (p)

What is public notice, where material, must depend, according to the Calcutta case, upon circumstances, upon the locality, and whether there are any, and what, newspapers in circulation there, or what are the usual means of giving public notice in the neighbourhood (q)

“Persons” dealing with a firm — This expression means “persons who have been in the habit of dealing with and at the time of the dissolution were contemplating further dealing with the firm, on the faith of the firm remaining the same as that with which their dealings commenced” (r)

**Dormant partner** — According to the English law if a dormant partner (i.e., one not known to be a partner) retires from the firm, though it be without notice to the customers of the firm, he cannot be held liable for partnership debts contracted after his retirement, the reason being that he never was known to be a partner, and no notice therefore was necessary. The same view has been taken by the Indian Courts in a large number of cases (s). In a Bombay case Beaman J. expressed the opinion that the present section applied to a dormant partner as well, and that if no notice of dissolution was given, he would be liable in respect of obligations incurred after

(o) *Ohundee Churn v Fduljee* (1882) 8 Cal 678, *fold Fzekiel Moses v Russia Engineering Works Ltd* (1923) 1 Ran 47, 74 I C 16. *Jagat Chandra Bhattacharyee v Gunny Hajee Akmal* (1925) 53 Cal 214, 91 I C 824, A I R 1926 Cal 271.

(p) *Jugaladutt P Pillani v Bansilal Motilal* (1929) 56 I A 174 115 I C 707, A I R 1929 P C 132.

(q) 8 Cal at p 684. Publication in Calcutta is not sufficient notice to a creditor in Madras. *Fazayulla v J A*

*Roy & Co*, 104 I C 120 A I R 1927 Mad 661.

(r) *Gorio v Vallabhdas* (1915) 17 Bom L R 762 765, 30 I C 864 per Beaman J. So *David Sassoon & Co's* petition 100 I C 389 A I R 1927 Sind 155 (apparently supposed reportable because the facts were rather long).

(s) *Ramasami v Adar Bibi* (1886) 9 Mad 492. *Hashmat Ali v Lachmi Narain* (1903) Punj Rec no 75. *Greaves v Parshottam* (1903) 5 Bom. L. R 366.

his retirement (t) We cannot agree with this, for the only ground on which a retired partner can be liable is that credit was given to him as an ostensible partner

**265.**—Where a partner is entitled to claim a dissolution of partnership, or where a partnership has terminated, the Court may, in the absence of any contract to the contrary, wind up the business of the partnership, provide for the payment of his debts and distribute the surplus according to the shares of the partners respectively (u)

**Amendment**—This section is printed as amended by the Indian Contract Act Amendment Act IV of 1886, s 1.

**Partner's right to accounts.**—Every partner's legal right to have the accounts taken on dissolution is unaffected by any question however grave, about his conduct in partnership affairs. The time for such questions to be decided is when the accounts are taken. *Ram Singh v Ram Chand* (1923) L R 51 I A 151, 79 I C 914, A I R 1921 P C 2. And in taking them he cannot be charged with estimated loss of profit caused by his want of diligence in the business, short of fraud or wilful default. *Mahadev v Ganoo* (1925) 27 Bom L R 500, 87 I C 735

**Old section**—The section as it originally stood ran as follows —

‘ In the absence of any contract to the contrary, after the termination of a partnership, each partner or his representatives may apply to the Court to wind up the business of the firm, to provide for the payment of its debts, and to distribute the surplus according to the shares of partners respectively

“*Explanation*—The Court in this section means a Court not inferior to the Court of a District Judge within the local limits of whose jurisdiction the place or principal place of business of the firm is situated ’

Under the old section it was held on the one hand that the section was only ancillary to the ordinary suit for winding up the affairs of a partnership and did not take away the ordinary right of a suit in any civil Court having juris-

(t) *Crown v Lal Patis* (1915) 17 Bom L R 172; 30 I C 694. It was held (see also *Bank of India v Bank of Australia*) that the section was not intended to take away the ordinary right of a suit in any civil Court having jurisdiction. (u) *Crown v Lal Patis* (1915) 17 Bom L R 172; 30 I C 694; A I R 1915 Pat 172. (v) *Crown v Lal Patis* (1915) 17 Bom L R 172; 30 I C 694; A I R 1915 Pat 172.



to be separate and altogether *dehors* the partnership, and as such capable of sustaining an action for contribution" (c) On the same principle if partners borrow money from a stranger for starting the partnership business, and a decree is obtained by the creditor against the partners and executed against one of them only for the full amount, he is entitled to contribution from his co partners (f) And one partner may likewise sue another for advances made by him not to the partnership concern, but to the other partner in respect of what he is to contribute to the joint capital (g) Similarly, a suit is maintainable by one partner upon a *promissory note* given to him by the other partners in respect of an advance made by him to the firm, and it is no answer to such a suit that if the general accounts of the partnership were taken, nothing would be found due to him (h) Upon the same principle if A and B enter into a partnership under an agreement that the whole capital should be brought in by A and that B should hand over to A all moneys received by him in the course of the partnership business irrespective of the state of the general account A can maintain a suit against B for moneys received by B but not handed over to A (i) But where an individual is a common partner in two firms no action can be brought by one firm against the other upon any transaction between them so long as that individual continues to be a common partner This doctrine, however, does not rest upon any principles of the law of partnership, but is founded on the elementary rule of procedure that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action (j)

**Appointment of receiver**—In England the effect of appointing a receiver is, to the extent of the authority delegated to him by the Court, to exclude every one else from exercising the authority of a partner, whether usual or specially regulated by agreement, and if he is also

(c) *Subbarayudu v Adinarayudu* (1891) 18 Ma L J 131 132 *Doyal v Akhtar* (1875) 12 B H C 97 107 *Burgess v Brown* (1854) 20 Cal 204

(f) *Lalau Sirdar v Chayon* (1911) 10 C W N 768 29 I C 811

(g) *20 B H C 601 supra*

(h) *10 Ma L J 131 132* *101 Cal 113* *101 Cal 113*

(i) *10 Ma L J 131 132* *101 Cal 113* *101 Cal 113*

*Sheth Furshtadmas* (1901) 20 B H C 607  
See also *Jamnah v Jambher* (1916) 43 Cal 737 740-741 31 I C 430

(j) *Karni Venkata Jelli v Kallu Varaswamy* (1905) 32 Mad 76 *Haj Melram v Haj Jamal* (1911) 12 Lab 301; 60 I C 174

(j) *20 B H C 612* See also the Code of Civil Procedure 1908 O 20 r 9



from preserving the property in the meantime (*w*), or enable a defendant to use such a technical objection to deny all relief to the plaintiff (*x*). The appointment of a receiver does not, of course, conclude any ultimate question.

A receiver and manager is an officer of the Court, and does not succeed to the personal fiduciary relations of partners. Accordingly, if he becomes entitled to an indemnity for expenses of management, he can look only to the assets under the control of the Court (*y*). He will not be restrained from dealing on his own account with customers of the firm, or competing with a purchaser of the business, doing nothing inconsistent with his employment while it lasts (*z*). A partner appointed receiver by the Court on the usual terms is entitled as such to his remuneration and costs out of the assets in his hands although as a partner he is in debt to the firm and unable to pay (*a*). His position as an officer of the Court is independent of the state of his accounts as a partner with the firm.

It is not thought useful to enter on administrative details of English practice, which are probably not applicable and certainly not binding in Indian Courts.

**Receivers in Indian practice**—The power of Indian Courts to appoint a receiver is now defined by O 10, r 1, of the Code of Civil Procedure, 1908. Under that rule a receiver may be appointed "where it appears to the Court to be just and convenient." The High Court here in their original jurisdiction possess the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act (*b*). And when the assets of a partnership are in the hands of a receiver, they cannot be attached by a creditor of the firm without the leave of the Court first obtained, as the assets in such a case are in the hands of the Court through its officer, the receiver, and such leave will not be granted except on such terms as will ensure equality between the creditors (*c*). The Procedure Code of 1908 (O 10) assimilates Indian to English practice.

(*w*) *Stephens v. Oxenford* (1888) 1 K. & J. 411 103 R. 1 203

(*x*) *Hare v. Hare* note (*a*) above

(*y*) *Farmer v. C. L.* [1911] 1 C. 15

(*z*) *Farmer* (1888) 43 C. 1 49

(*a*) *Barry v. Scott* [1888] 1 C. 50

(*b*) *Jackson v. Zetser* (1888) 14 B. & 431 431

(*c*) *Allen v. The Bank of India* (1888) 14 B. & 431 431

*Farmer* (1888) 43 C. 1 49

**Limitation period for a suit for dissolution**—The period of limitation for a suit for an account and a share of the profits of a dissolved partnership is three years from the date of dissolution (d), and the period is the same even if the instrument of partnership is registered (e)

**Assets brought in after dissolution.**—Where after a dissolution and winding up of the partnership affairs an asset falls in which for any reason has not been taken into account, "it ought to be divided between the ex partners or their representatives, according to their shares in the former partnership" (f) But if there has been no taking of accounts and no final settlement, the proper remedy is to have the accounts of the partnership taken, and if it is too late to do that it is too late to claim a share in the newly recovered asset, for the plaintiff could not make such a claim good without showing that he would be entitled to that share upon the due taking of the accounts (g)

**Costs in a suit for dissolution**—Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or, in default of assets, by the partners in proportion to their respective shares, unless any partner denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, when he is usually made to pay the costs up to the hearing (h)

**Interest**—Interest on any sum found due to a partner runs only from the date of the final decree by which it is found due. A partner is not generally chargeable with interest on overdrawings (i)

Interest on any amount found due on a suit for dissolution of a partnership was from the date of the decree finding it due, not of the plaint (ii)

(d) Limitation Act 1908, Sched I art 106. See *Sudarsanam v Narasimulu* (1901) 25 Mad 149

(e) *Kairavan v Ponnayya* (1893) 22 Mad. 14

(f) Dicta in *Anor v Gye* (1872) L R 5 H L 658, as explained in the case next cited (they were misunderstood in some of the Indian High Courts)

(g) *Gopala Chetty v Jayaraghavarao* [1922] 1 A C 488, 49 I A 181, 45 Mad 378, 74 I C 621, reversing the

decision of the High Court of Madras and overruling *American v Hormuzi v Rustomji Burjorji* (1887) 6 Bom 6-8. *Saklanadha v S* (1904) 28 Mad 344. *Sadhu Narayana v Ramaswami* (1908) 32 Mad 203 and cases following them

(h) *Ram Chunder v Manick Chunder* (1881) 7 Cal 428

(i) *Suleman v Abdul Latif* (1930) L R 57 I A 245

(ii) *Ibid*

**Form of plaint in a suit for dissolution**—See for former practice Civil Procedure Code, 1882, Sched IV, No 113, as to forms of decrees, see Nos 132 and 133 (j), and now Civil Procedure Code, 1908, Sched I, App A, No 19, as to form of plaint, Sched I, App D, Nos 21 and 22, as to forms of decrees (k)

**266.**—Extraordinary partnerships, such as partnerships with limited liability, incorporated partnerships and joint stock companies, shall be regulated by the law for the time being in force relating thereto

*Cp P A s 1, sub s (2)* The broad difference in principle between ordinary and extraordinary partnerships is that the former are founded on the mutual confidence of the members, while the latter are composed of a fluctuating number of individuals who put their trust, not in one another, but in a governing body—board of directors, council, or however otherwise named—appointed under the statutory or voluntary constitution of the society

The law relating to extraordinary partnerships is now contained in the Indian Companies Act VII of 1913 and other special enactments under which companies created for various express purposes have been incorporated

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(j) *Thirukumaresan v Subbaraja* (1830) 20 Mad 313 purpose of court fees *Chunni Lal v Sheo Chaban Lal* (1925) 17 All 689 I C 122, A I R 1925 All 787

(k) See further, as to valuation for the

# SCHEDULE.

## SCHEDULE.

[NOTE.—This Schedule has been repealed by the Repealing and Amending Act, 1914.]

### ENACTMENTS REPEALED

#### Statutes

| No and year of Statute.    | Title   | Extent of Repeal            |
|----------------------------|---|-----------------------------|
| Stat. 29 Car II. c. 3 (l)  | An Act for prevention of frauds and perjuries                           | Sections 1, 2, 3, 4, and 17 |
| Stat 11 & 12 Vict c 21 (m) | To consolidate and amend the law relating to insolvent debtors in India | Section 42                  |

#### Acts

| No and year of Act | Title  | Extent of Repeal  |
|--------------------|--|-------------------|
| Act XIII of 1840   | An Act for the amendment of the law  | The whole         |
| Act XIV of 1840    | as altered and amended by the stat 6 Geo IV c 94<br>An Act for rendering a written memorandum necessary to the validity of cer   | The whole         |
| Act XX of 1844.    | An Act to amend the law relating to  | The whole         |
| Act XXI of 1848    | as altered by this Act<br>An Act for avoiding wagers   | The whole         |
| Act V of 1866 (n)  | An Act to provide a summary procedure on bills of exchange, and to amend in certain respects the commercial law of British India | Sections 9 and 10 |
| Act XV of 1866     | An Act to amend the law of partnership in India  | The whole         |
| Act VIII of 1867   | An Act to amend the law relating to horse racing in India  | The whole         |

(l) Short title, "The Statute of Frauds." See the Short Titles Act, 1896 (59 & 60 Vict. c 14).

(m) The Indian Insolvency Act, 1848

(n) Short title, "The Policies of Insurance (Marine and Fire) Assignment Act, 1866" See the Indian Short Titles Act XIV of 1897



# THE SPECIFIC RELIEF ACT, 1877.

## (ACT No. I OF 1877.)

### CONTENTS

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#### PREFAMBLE

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### PART I

#### PRELIMINARY

#### SECTIONS

- 1 Short title  
Local extent  
Commencement
  - 2 [*Repealed* ]
  - 3 Interpretation clause  
Words defined in Contract Act
  - 4 Savings
  - 5 Specific relief how given
  - 6 Preventive relief
  - 7 Relief not granted to enforce penal law
- 

### PART II

#### OF SPECIFIC RELIEF

---

### CHAPTER I

#### OF RECOVERING POSSESSION OF PROPERTY

##### *(a) Possession of Immoveable Property*

- 8 Recovery of specific immoveable property
- 9 Suit by person dispossessed of immoveable property

##### *(b) Possession of Moveable Property*

- 10 Recovery of specific moveable property
- 11 Liability of person in possession not as owner, to deliver to person entitled to immediate possession

# THE SPLICIC RELIEF ACT, 1877.

## CHAPTER VII.

### OF THE APPOINTMENT OF RECEIVERS

#### SECTIONS.

- 44 Appointment of Receivers discretionary.  
Reference to Code of Civil Procedure
- 

## CHAPTER VIII.

### OF THE ENFORCEMENT OF PUBLIC DUTIES.

- 45 Power to order public servants and others to do certain specific acts  
Exemptions from such power  
46 Application how made  
Procedure thereon  
Order in alternative  
47 Peremptory order  
48 Execution of, and appeal from, orders  
49 Costs  
50 Bar to issue of *mandamus*  
51 Power to frame rules
- 

## PART III

### OF PREVENTIVE RELIEF.

## CHAPTER IX

### OF INJUNCTIONS GENERALLY.

- 52 Preventive relief how granted  
53 Temporary injunctions  
Perpetual injunctions
- 

## CHAPTER X.

### OF PERPETUAL INJUNCTIONS

- 54 Perpetual injunctions when granted  
55 Mandatory injunctions  
56 Injunctions when refused  
57 Injunction to perform negative agreement
- 

## SCHEDULE

### [ENACTMENTS PRELIMINARY]

*Repealed*

## INTRODUCTORY.

*Position of Specific Relief in English Procedure.*

Specific relief, as a form of judicial redress, belongs to the law of Procedure, and, in a body of written law arranged according to the natural affinities of the subject-matter, would find its place as a distinct Part or other division of the Civil Procedure Code. This has not happened in India because in England, some centuries ago, the King's ordinary Civil Courts of law had in general (a) no other instrument of coercion than distraint on property (though by a series of statutes, many of them early, imprisonment was authorised in aid of the preliminary stages of process; hence the so-called imprisonment for debt which makes a large figure in English prose fiction down to the middle of the nineteenth century). Payment of money was the only satisfaction the suitor could obtain from the Court of Common Pleas, or other Courts which shared or imitated its jurisdiction, in the regular course of justice. Therefore in many cases where money compensation, even if available, was not an adequate satisfaction, the King's justice was in default. It is now familiar learning to all students of legal history that in the early stages of judicial institutions we constantly find the *power of Courts to enforce decisions or even to compel the appearance of parties rudimentary if not wholly wanting*. There is therefore nothing to be surprised at in the limited scope of common law remedies in the Middle Ages. The question why it was not enlarged until the latter part of the

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(a) The earlier medieval actions for the recovery of land were practically obsolete after the Restoration at latest; the action of ejectment which took their place has a peculiar history: the action of detinue professed by the form of the judgment

to give specific relief, with the value of the goods and damages as an alternative, but specific delivery could not be enforced. None of these actions, it will be observed, was founded on contract.

nineteenth century has its interest, an interest, however, not material for any practical purpose in British India. The reader may take it as a fact that down to the eighteenth century any such proposal, at any rate coming from official quarters, would have been looked on with suspicion. Meanwhile the Chancellor, exercising the King's reserved power of doing justice in an extraordinary way where the ordinary means failed, had undertaken to make the defect good. The Chancellor's justice, in a proper case, would compel a man actually to perform what he had undertaken, not merely to pay damages for breaking his promise. Disobedience to the Chancellor's order was contempt of the King, a personal offence punishable by imprisonment until the command, in theory a special royal command, was obeyed. Such was the sanction of all equitable jurisdiction. A very obstinate party might choose to remain in prison rather than execute a conveyance, and sometimes did. Only in quite recent times have the Courts acquired power to do, without any concurrence of a party in default, that which he ought to have done.

Hence were derived both the strength and the weakness of Courts of Equity. They could do much that a Court of Common Law could not do, but they had to justify their action on the ground that the suitor showed some special cause for seeking a kind of relief which was originally conceived as extraordinary. This was especially so in cases where the plaintiff had a legal right, a right for which the Common Law provided some remedy, but the Common Law was inadequate in the sense of not being fitted to do full justice in the case. The doctrine and practice of Specific Performance belong to this class (see more on Ch. II of the Act).

In consulting English authorities it must be remembered that as Courts of Common Law could not give specific relief in their ordinary civil jurisdiction till after the middle of the nineteenth century, so Courts of Equity had no power

to award damages (b). Accordingly a plaintiff who sought specific relief might not claim damages in the alternative; if he failed, his only remedy was to commence an action in the appropriate common law jurisdiction. "He may make what he can of it at law" was a current phrase. Attention to this peculiarity will often explain the practical bearing of arguments that otherwise might seem obscure.

If the work were to be done afresh without regard to historical accidents, there would be no reason for having a separate Specific Relief Act at all; its contents would be divided between the Civil Procedure Code and the Transfer of Property Act. Such a drastic reform may well, as things are, not be worth the pains, but some revision in detail appears desirable. For example, s. 57 is in conflict with the later English authorities, and the persistent though mostly futile attempts to evade the important proviso to s. 42, for the purpose of obtaining in effect the benefit of a substantive decree without paying the proper court fee for it, seem to point to a need for more explicit and stringent wording.

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(b) Sometimes they contrive to go near it Fry on Specific Performance, § 1299

# THE SPECIFIC RELIEF ACT.

(ACT No. I OF 1887.)

[7th February, 1877.]

AN ACT TO DEFINE AND AMEND THE LAW RELATING TO  
CERTAIN KINDS OF SPECIFIC RELIEF.

S. R. A. WHEREAS it is expedient to define and amend the law  
S. 1. relating to certain kinds of specific relief  
Preamble obtainable in civil suits. It is hereby enacted  
as follows :—

## PART I.

### PRELIMINARY.

1. This Act may be called the Specific Relief Act,  
Short title 1877 (a) :

(a) For Statement of Objects and Reasons, see Gazette of India, 1875, Pt. V., p. 258, for Report of the Select Committee, see *ibid*, 1876, Pt. V., p. 1415; for discussions in Council, see *ibid*, 1875, Supplement, pp. 981 and 1023; *ibid*, 1876, Supplement, p. 1284, and *ibid*, 1877, Supplement, p. 877.

Act I of 1877 has been declared in force in Upper Burma generally (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), s. 4 (1), Burma Code, Ed. 1899.

It has been extended by notification under s. 5 of the Scheduled Districts Act, 1874, to the following Scheduled Districts, namely :—

The Scheduled Districts of the Punjab,

including at the time districts which  
now form the North-West Frontier  
Province

Gazette of India, 1877, Pt. I, p. 562;

the Districts of Kamrup, Naugong,

Darrang, Sibsagar, Lakhimpur, Goal  
para (excluding the Eastern Duars),  
Sylhet, and Kachar (excluding the  
North Kachar Hills)

*ibid*, 1877, Pt. I, p. 662;

the Districts of Hazaribagh, Lohardaga

(including the present district of  
Palamau, separated in 1894) and  
Manbhum and Pargana Dhalbhum in  
the District of Burdwan (the Lohar  
daga District is now called the Pargana  
District, see Calcutta Gazette, 1899,  
Pt. I, p. 44)

*ibid*, 1878, Pt. I, p. 82;

Local extent It extends to the whole of British India, except the Scheduled Districts as defined in Act No. XIV of 1874.

Commencement And it shall come into force on the first day of May, 1877.

## 2. [*Repeal of enactments.*] *Rep., Act XII of 1891.*

3. In this Act, unless there be something repugnant <sup>Interpretation</sup> <sup>clause</sup> in the subject or context,—

“obligation” includes every duty enforceable by law :

“trust” includes every species of express, implied or constructive fiduciary ownership :

“trustee” includes every person holding, expressly by implication or constructively, a fiduciary character

### *Illustrations*

(a) Z. bequeaths land to A, “not doubting that he will pay thereout an annuity of Rs 1,000 to B for his life” A. accepts the bequest A is a trustee, within the meaning of this Act, for B, to the extent of the annuity

(b) A is the legal, medical or spiritual adviser of B By availing himself of his situation as such adviser, A gains some pecuniary advantage which might otherwise have accrued to B A is a trustee, for B, within the meaning of this Act, of such advantage

(c) A, being B's banker, discloses for his own purpose the state of B's

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the Scheduled Districts of the Central

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| Provinces  | Gazette of India, 1870, Pt I p 772           |
| Sind   | ib, 1880, Pt. I, p 676,                      |
| Coorg  | ib, 1882, Pt I, p 217.                       |
| Western Jalpaiguri   | ib, 1882, Pt I, p 511,                       |
| that portion of the Jalpaiguri District known as the Western Duars | ib, 1896, Pt I, p 44.                        |
| Kumaon and Garhwal and the Tarai Parganas                          | ib, 1886, Pt I, p 452, and 1895, Pt I, p 573 |
| Ajmere and Merwars   | ib, 1897, Pt I, p 1415                       |

S 9 has been extended by notification under s 5 of the Scheduled Districts Act, 1874, to the Taluqs of Bhadrachalam and Rakapilli and the Rampa Country [Gazette of India, 1879, Pt I, p 630]. to the scheduled portion of the Mirzapur District, *see* Gazette of India, 1886, Pt I, p 452 Section 9 has also been extended, by notification under the same Act, to tracts in the Godavari Agency, to which it had not already been extended, *see* Gazette of India, 1900, Pt I, p 59

S 9 has been declared in force in British Baluchistan by the British Baluchistan Laws Regulation, 1890 (I of 1890) s 3, Baluchistan Code, Ed 1900, p 60

# THE SPECIFIC RELIEF ACT.

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[7th February, 1877.]

AN ACT TO DEFINE AND AMEND THE LAW RELATING TO  
CERTAIN KINDS OF SPECIFIC RELIEF.

S. R. A.  
S. 1.

WHEREAS it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suits. It is hereby enacted as follows. —

Preamble

### PART I.

#### PRELIMINARY.

1. This Act may be called the Specific Relief Act,  
Short title 1877 (a).

(a) For Statement of Objects and Reasons, see Gazette of India, 1875, Pt V, p 208, for Report of the Select Committee, see *ibid*, 1876, Pt V, p 1445, for discussions in Council, see *ibid*, 1876, Supplement, pp 981 and 1025, *ibid*, 1876, Supplement, p 1284, and *ibid*, 1877, Supplement, p 877

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including at the time districts which  
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the Districts of Kamrup, Nagaong,  
Darrang, Sylmagar, Lakhimpur, Goal  
para (excluding the Eastern Dangs),  
Sylhet, and Kachar (excluding the  
North Kachar Hills)

ib, 1877, Pt I, p 662.

the Districts of Hazaribagh Loharlaga  
(including the present district of  
Palamau, separated in 1894) and  
Manthum and Pargana Dhalthum in  
the District of Singbhum [the Lohar  
daga District is now called the Panchi  
District, see Calcutta Gazette, 1892,  
Pt. I, p 44]

ib, 1876, Pt I, p 871

It extends to the whole of British India, except the Scheduled Districts as defined in Act No. XIV of 1874.

Local extent

Commencement And it shall come into force on the first day of May, 1877.

## 2. [*Repeal of enactments.*] *Rep, Act XII of 1891.*

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Interpretation clause

“obligation” includes every duty enforceable by law :

“trust” includes every species of express, implied or constructive fiduciary ownership :

“trustee” includes every person holding, expressly by implication or constructively, a fiduciary character .

### *Illustrations*

(a) Z bequeaths land to A, “not doubting that he will pay thereout an annuity of Rs 1,000 to B for his life” A, accepts the bequest A is a trustee, within the meaning of this Act, for B, to the extent of the annuity

(b) A is the legal, medical or spiritual adviser of B By availing himself of his situation as such adviser, A gains some pecuniary advantage which might otherwise have accrued to B A is a trustee, for B., within the meaning of this Act, of such advantage

(c) A, being B's banker, discloses for his own purpose the state of B's

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| Provinces  | Gazette of India, 1879, Pt I, p 772          |
| Sind   | ib, 1880, Pt I, p 676,                       |
| Coorg  | ib, 1882, Pt I, p 217,                       |
| Western Jalpaiguri   | ib, 1882, Pt I, p 511,                       |
| that portion of the Jalpaiguri District known as the Western Duars | ib, 1896, Pt I, p 44                         |
| Kumaon and Garhwal and the Tarai Parganas                          | ib, 1886, Pt I, p 452, and 1895, Pt I, p 573 |
| Ajmere and Merwara   | ib, 1897, Pt I, p 1415                       |

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S 9 has been declared in force in British Baluchistan by the British Baluchistan Laws Regulation, 1890 (I of 1890) s 3, Baluchistan Code, Ed 1900, p. 69

S. R. A.  
S. 3.

account A is a trustee, within the meaning of this Act, for B, of the benefit gained by him by means of such disclosure

(d) A, the mortgagee of certain leaseholds, renews the lease in his own name A is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease

(e) A, one of several partners, is employed to purchase goods for the firm A, unknown to his co partners, supplies them, at the market price with goods previously bought by himself when the price was lower, and thus makes a considerable profit A is a trustee, for his co partners within the meaning of this Act, of the profits so made

(f) A, the manager of B's indigo factory, becomes agent for C, a vendor of indigo seed, and receives, without B's assent, commission on the seed purchased from C for the factory A is a trustee, within the meaning of this Act, for B, of the commission so received

(g) A buys certain land with notice that B has already contracted to buy it A is a trustee, within the meaning of this Act, for B, of the land so bought

(h) A buys land from B, having notice that C is in occupation of the land A omits to make any inquiry as to the nature of C's interest therein A is a trustee, within the meaning of this Act, for C, to the extent of that interest

"Settlement" means any instrument (other than a will or codicil as defined by the Indian Succession Act) (b) whereby the destination or devolution of successive interests in moveable or immovable property is disposed of or is agreed to be disposed of

and all words occurring in this Act, which are defined in the Indian Contract Act, 1872 (c), shall be deemed to have the meanings respectively assigned to them by that Act

*Words defined in Contract Act*  
**Obligation, etc.**—If obligation and enforceable duty are to be synonymous, why use the longer word, which is also the less accurate? In Roman law "obligation" is confined to duties between definite persons in old English law it was confined to one special kind of instrument modern scientific writers for the most part use it in the Roman sense Such however is the definition

With regard to "trust" it will be observed that the Trusts Act (II of 1852) was passed some years later In that Act the "constructive trust" of English books is called an obligation in the nature of a trust so that as a matter of verbal definition the expressions "trust" and "trustee" are wider in the Specific Relief Act From an English point of view it would be easy to criticize the language of the illustra-

(b) Act IX of 1865 (now Act XXIII of 1880) (c) Act IX of 1872

tions in one or two places. But such criticism would not be profitable for Indian purposes.

The illustrations are intended to explain the extent of the definitions, not to state cases necessarily falling within any section of the Act. Thus illustrations (e) and (f), so far as regards the legal result of the facts, would come under the Contract Act—see ss 216, 218, 258.

**Express, implied or constructive trust**—Trusts, according to English law, are either (1) express, or (2) constructive or implied. An express trust is one which is created by the actual terms of some instrument or declaration. A constructive or implied trust arises when property, not impressed for the time being with any express trust, is acquired or held by a person in circumstances which render it obligatory upon him to hold it for the benefit of some other person as beneficiary (d). The expressions “express trust,” “implied trust,” and “constructive trust” are not used in the Indian Trusts Act, 1882. What are called express trusts in English law are called merely “trusts” (defined in s 3), and are dealt with in ss 4 to 79, while what are called constructive or implied trusts in English law are called “obligations in the nature of trusts” and are dealt with in ss 80 to 96. The Indian Trusts Act may thus be divided into two parts, one dealing with the express trusts of the English law and the other with the constructive or implied trusts of that law.

III. (a)—This is an instance of what is known in the English law as precatory trust. A precatory trust is one created by precatory words, such as expressions of confidence, request, or desire that property will or shall be applied for the benefit of certain named individuals. For another instance, see the Indian Trusts Act, 1882 s 6, ill (a).

III (b)—Compare Indian Trusts Act, 1882, s 88.

III (d)—The case of a mortgagee renewing a lease is now dealt with in the Transfer of Property Act, 1882, s 64, and the Indian Trusts Act, 1882, s 90.

III (g)—The case of A buying land with notice that B has already contracted to buy it is now dealt with in the Indian Trusts Act, 1882, s 91, and the Transfer of Property Act, 1882, s 40 [of which see ill (a)]. In such a case A stands in the position of a trustee for B of the land purchased by him, and he could not profit by the conveyance.

S. R. A  
Ss 3, 4.

to him except to stand in the shoes of his vendor and receive the purchase from B, on payment of which he would have to convey the land to B (c) See also s 27, clause (b), and the second illustration to clause (b), pp 813, 814, below

A agrees to sell certain land to B, and puts him in possession under the agreement B is ready and willing to complete the purchase and take a registered conveyance from A Before any conveyance is executed, A sues B for possession of the land According to a Full Bench of the Madras High Court, A is entitled to possession the reason given being that under s 54 of the Transfer of Property Act 1882, an agreement for sale of immovable property does not of itself create any interest in or charge on such property and that the provisions of the section are imperative (f) On the other hand it has been held by a Full Bench of the Bombay High Court (g) that A is not entitled to possession According to that Court s 54 of the Transfer of Property Act does not exhaust the relations which flow from a contract for sale of immovable property according to the Indian Statute Law, and A stands in a fiduciary relation to B having regard to the provisions of s 10 of that Act s 91 of the Indian Trusts Act and s 3 of the Specific Relief Act read with ill (g) thereto Scott C J said Where a vendor who has contracted to sell immovable property and has under the contract put the prospective vendee in possession sues the latter in ejectment he repudiates if the vendee is willing to complete the purchase the fiduciary obligation arising out of the contract and annexed to the ownership of the property, and seeks to treat the vendee as a trespasser Once it is recognised that the plaintiff is violating his fiduciary obligation it is clear that the Court cannot grant him the relief which he seeks for it will not aid him in committing a breach of trust and his suit must fail the defendant is no trespasser, but is in possession under the contract which the plaintiff has bound himself to carry out

4. Except where it is herein otherwise expressly  
Savings enacted, nothing in this Act shall be deemed  
(a) to give any right to relief in respect of any agreement which is not a contract ,

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(a) *Chinnappa v Jeyamma* (1916) 40  
L. R. 424 27 I C 250  
(f) *Parthasarathy v Kumar*  
*Jeyamma v Jeyamma* (1916) 43  
L. R. 424 27 I C 250  
(g) *Thappa Appa v Parthasarathy*  
(1917) 41 Bom 494 31 I C 13 (F. B.)  
*Jeyamma v Jeyamma* (1917) 43  
L. R. 424 27 I C 251

- (b) to deprive any person of any right to relief other than specific performance, which he may have under any contract ; or
- (c) to affect the operation of the Indian Registration Act on documents

Clause (a) —The expression “ agreement ” is defined in the Indian Contract Act, 1872, s 2, cl (e), and “ contract ” in s 10 of the same Act See the last paragraph of s 3, above

Clause (c) —A executes a writing whereby he agrees to grant a lease of his land for B for a period of five years A delivers possession of the land to B under the agreement, but the writing is not registered A. sues B for specific performance The writing, not being registered, is not admissible in evidence, and A's suit must be dismissed See Registration Act, 1908, s 2 (7), s 17 (1) (d), and s 49 (c)

Specific relief  
how given

## 5. Specific relief is given—

- (a) by taking possession of certain property and delivering it to a claimant ,
- (b) by ordering a party to do the very act which he is under an obligation to do ,
- (c) by preventing a party from doing that which he is under an obligation not to do ,
- (d) by determining and declaring the rights of parties otherwise than by an award of compensation , or
- (e) by appointing a receiver

Clause (a) —See ss 8–11

Clause (b) —See ss 12–30

Clause (c) —See ss 53–57

Clause (d) —See ss 42–43

Clause (e) —See s 44

See notes to s 7, below

Preventive  
relief

## 6. Specific relief granted under clause

- (c) of section 5 is called preventive relief (h)

See notes to s 7, below

S. R. A  
Ss. 3, 4.

to him except to stand in the shoes of his vendor and receive the purchase from B, on payment of which he would have to convey the land to B (e) See also s 27, clause (b), and the second illustration to clause (b), pp 813, 814, below

A agrees to sell certain land to B, and puts him in possession under the agreement B is ready and willing to complete the purchase and take a registered conveyance from A Before any conveyance is executed, A sues B for possession of the land According to a Full Bench of the Madras High Court A is entitled to possession the reason given being that under s 51 of the Transfer of Property Act 1882, an agreement for sale of immovable property does not of itself create any interest in or charge on such property and that the provisions of the section are imperative (f) On the other hand it has been held by a Full Bench of the Bombay High Court (g) that A is not entitled to possession According to that Court s 51 of the Transfer of Property Act does not exhaust the relations which flow from a contract for sale of immovable property according to the Indian Statute Law and A stands in a fiduciary relation to B having regard to the provisions of s 10 of that Act, s 91 of the Indian Trusts Act and s 3 of the Specific Relief Act read with ill (g) thereto Scott C J said Where a vendor who has contracted to sell immovable property and has under the contract put the prospective vendee in possession sues the latter in ejectment, he repudiates if the vendee is willing to complete the purchase the fiduciary obligation arising out of the contract and annexed to the ownership of the property, and seeks to treat the vendee as a trespasser Once it is recognised that the plaintiff is violating his fiduciary obligation it is clear that the Court cannot grant him the relief which he seeks for it will not aid him in committing a breach of trust and his suit must fail the defendant is no trespasser but is in possession under the contract which the plaintiff has bound himself to carry out

4. Except where it is herein otherwise expressly  
savings enacted, nothing in this Act shall be deemed

(a) to give any right to relief in respect of any agreement which is not a contract,

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| (e) <i>Chinnayyan v. Iyengar</i> (1917) 41<br>1 M 43, 27 I C 250 | (f) <i>Iyer v. Iyer</i> (1917) 41 M 434, 27 I C 13 (B) |
| (g) <i>Iyer v. Iyer</i> (1917) 41 M 434, 27 I C 13 (B)           | <i>Iyer v. Iyer</i> (1917) 41 M 434, 27 I C 13 (B)     |

- (b) to deprive any person of any right to relief other than specific performance, which he may have under any contract; or
- (c) to affect the operation of the Indian Registration Act on documents

Clause (a) —The expression "agreement" is defined in the Indian Contract Act, 1872, s 2, cl (e), and "contract" in s 10 of the same Act See the last paragraph of s 3, above

Clause (c) —A executes a writing whereby he agrees to grant a lease of his land for B for a period of five years A delivers possession of the land to B under the agreement, but the writing is not registered A sues B for specific performance The writing, not being registered, is not admissible in evidence, and A's suit must be dismissed See Registration Act, 1908, s 2 (7), s 17 (1) (d), and s 49 (c)

Specific relief  
how given

## 5. Specific relief is given—

- (a) by taking possession of certain property and delivering it to a claimant,
- (b) by ordering a party to do the very act which he is under an obligation to do,
- (c) by preventing a party from doing that which he is under an obligation not to do,
- (d) by determining and declaring the rights of parties otherwise than by an award of compensation, or
- (e) by appointing a receiver

Clause (a) —See ss 8–11

Clause (b) —See ss 12–30

Clause (c) —See ss 53–57

Clause (d) —See ss 42–43

Clause (e) —See s 44

See notes to s 7, below

Preventive  
relief

## 6. Specific relief granted under clause

- (c) of section 5 is called preventive relief (h)

See notes to s 7, below

S. R. A.  
Ss. 7, 8.

Relief not  
granted to enforce  
penal law

7. Specific relief cannot be granted for the mere purpose of enforcing a penal law.

**Note on secs. 5-7.**—These sections are in the nature of abundant preliminary explanation or caution, and cannot affect the construction of the detailed provisions which follow in their proper places; the contents of the Act set out at the head are a better guide to those provisions. Whitley Stokes pointed out long ago that s. 5 is really of no use. S. 7 is a negative statement of the principle more clearly expressed by saying that, specific relief being a civil remedy, the plaintiff must show some individual right to it in every case, claiming either performance of what is due to him or repression of wrong committed or threatened against him in particular.

**What is enforcing penal law.**—To direct a magistrate to furnish copies of the proceedings in a case before him to the unsuccessful prosecutor does not amount to granting specific relief to enforce a penal law. Such a direction, therefore, is not against the provisions of this section (1).

## PART II.

### OF SPECIFIC RELIEF

#### CHAPTER I.

#### OF RECOVERING POSSESSION OF PROPERTY

##### (a) *Possession of Immoveable Property*

8. A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure (j)

In the manner prescribed by the Code of Civil Procedure. That is to say, by a suit for ejectment on the basis of title (k).

(i) *Bank of England v. Douglas & Lloyds* (1882) 5 Cal. 174.  
(j) *Act of 1882*

(k) *See Anson v. Slingsby* (1881) 33 All. 176, 180, 71 C. C. 311.

9. If (l) any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit \* \* \* (m), recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

**Restitution of dispossessed holder.**—This section affirms an important principle of substantive law. Disputed rights are to be decided by due process of law and not otherwise and existing peaceable possession will be protected against disturbance without regard to the question of its origin (n). The only way to do this with effect is to restore the dispossessed holder, without prejudice to the ultimate rights of any adverse claimants, including the dispossessioner himself. Those rights, however, must be asserted in a court of justice and the question of title dealt with in regular course. Inasmuch as dispossession is commonly a notorious and easily proved fact, and matters of title involving legal argument cannot be dealt with in a suit under this section, the decision in such a suit is not subject to appeal.

The distinction between summary or comparatively summary process for the protection of possessor and litigation for the final settlement of titles between contending claimants is familiar in English law and goes back to the Middle Ages, although there is now no formal difference in the procedure. It does not necessarily involve the

(l) But see as to tenancies in the Punjab, the Punjab Tenancy Act, 1887 (XVI of 1887), s. 51, Punjab Code, Ed. 1903, p. 201. As to the practice in cases subject to the Central Provinces Tenancy Act, see *Motilal v Nankhela* (1930) L R 57 I A 333.

(m) The words "instituted within six months from the date of dispossession" were repealed by the Repealing and Amending Act, 1891 (XII of 1891).

(n) See *Glenwood Lumber Co v Phillips* [1904] A C 405, 410.

S. R. A  
S 9

doctrine, fully worked out in England only in our time, that possession itself has all the incidents of title as against all men who have not a better right. We cannot undertake to develop that proposition here. The present writer has endeavoured elsewhere to state it with as little technical detail as possible (o).

English law permits though it does not encourage a person who is actually entitled to the possession of immovable property (not one who erroneously, however honestly and plausibly, thinks himself entitled) and is out of possession to re-enter without breach of the peace if he can. This concession to self help was inevitable in days when the superior courts were closed for great part of the year and twenty miles were counted a long day's journey. Such cases are not now frequent though not wholly unknown (p), we do not think it useful to make further reference to them here, still less to the peculiar and difficult questions raised on the medieval statutory prohibition of forcible entry.

**Possession, title and evidence**—The Act assumes the general rules of law concerning possession to be known whether because the draftsman supposed them to be simple and obvious or because he knew them to be so much otherwise that any attempt at definition in a short compass would be perilous. It skills not to inquire. The most we can do here is to recall a few of the elementary principles which are material to be borne in mind in practice.

Possession in fact is manifested by the exercise of such exclusive control as the object is capable of. It need not always be complete or immediate visible control, in the case of wild uncleared land payment of taxes may be sufficient evidence of possession as being the only practicable act of dominion (q) and where a continuous parcel of land is held under one and the same claim of title, acts of control or enjoyment done in one part of it are relevant to show possession of the whole (r).

The Common Law generally attributes possession in law to the person exercising control in fact on his own account whether for a

(o) I Hask. First Book of Jurisprudence (1870) pp. 184-191.  
(p) *Jerry v. C. Smith* [1907] A.C. 73.

(q) *Levy v. Telford* (1870) 1 App. Cas. 411.

(r) *Jerry v. C. Smith* [1912] A.C. 73.

(r) The clause about rights to take the full rent in *Jones v. Williams* (1837) 2 M. & W. 376, 46 E.R. 611 approved in *Lord Alford v. F. Taylor* (1870) 4 Q.B. Cas. 770-791. On sales of property sold as such, see *The T. & A. Co. v. The T. & A. Co.* [1911] 1 Q.B. 104.

greater or a lesser interest, provided that the control is intended to be exclusive (s). The only practical exception is where the custodian is acting merely on behalf of a person whose orders he is bound to obey. Such a custodian is called a servant or bailiff in law, whether answering or not answering that description in popular language. This is hardly a real exception.

It is a rare but possible case that possession is in dispute between claimants of whom neither can be said to possess in fact, in such case it is a very ancient rule that possession follows title, that is, the law attributes possession to the claimant whose title is the better. This applies to both immovable and movable property (t).

**Limitation**—A suit under this section should be brought within six months from the date when the dispossession occurs (Limitation Act, Art. 3) (u).

**Object of the section**—This section corresponds with s. 15 of the Indian Limitation Act XIV of 1859 (v). The object is to discourage people from taking the law into their own hands, however good their title may be (w). The section was enacted to prevent persons ousting a man from possession except by process of law. It provides a summary and speedy remedy through a medium of the Civil Court for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if they are so advised (x), the remedy, independent of the Act, of a suit founded on a claim of possessory title is not excluded (y).

**Scope of the section**—Section 8 of the Act provides that a person entitled to the possession of specific immovable property may recover

(s) Otherwise in Roman law there fore comparison of the Common Law with Roman or Romanised learning should be undertaken only by first hand students of the Roman authorities and even by them with special caution.

(t) *Lamany v. Margrett* [1891] 2 Q. B. 18, 27.

(u) A defendant who has been added as a party on his own application cannot afterwards resist a decree on the ground that he was so added more than six months after the alleged dispossession.

*Bhaidin v. Ibrahim* (1923) 30 B. L. R. 1405, 112 I. C. 786, A. I. R. 1923 Bom. 506.

(v) As to cases decided under that section see Broughton's Code of Civil Procedure, 1859, pp. 572-573.

(w) *Krishnarao v. Parades* (1884) 8 Bom. 371, 375, *Pudappa v. Varnanrao* (1905) 29 Bom. 213.

(x) *Wali Ahmed v. Ajallu Kaur* (1891) 13 All. 537, 558, 562.

(y) *Pari Dayal v. Sarwan* (1907) 49 All. 191, 92 I. C. 573.

S. R. A.  
S. 9.

it in the manner prescribed by the Code of Civil Procedure, that is to say, by a suit for ejectment *on the basis of title*. Sec 9 gives a summary remedy to a person who has without his consent been dispossessed of immovable property otherwise than in due course of law, for recovery of possession *without establishing title*, provided that his suit is brought within six months of the date of dispossession. The second paragraph of the section provides that the person against whom a decree may be passed under the first paragraph may, notwithstanding such decree sue to establish his title and to recover possession (2). The two sections give alternative and distinct remedies. If a suit is brought under section 9 for recovery of possession, no question of title can be raised or determined in that suit or in working out the judgment (a). The object of the section is clearly to discourage forcible dispossession and to enable the person dispossessed to recover possession by merely proving previous possession and wrongful dispossession without proving title, but that is not his only remedy. He may if he so chooses, bring a suit for possession on the basis of his title (b). But if he does so he cannot change his ground and ask for judgment under this section, which does not apply to such a suit (c).

**Failure to prove title in a suit for possession based on title—**Accordingly when a plaintiff sues for possession on the basis of title and fails to establish title, he is not entitled to a decree for possession under the first paragraph of this section even if he can prove possession within six months anterior to his dispossession (d). Where a suit which is really based upon title is dealt with by the Court of first instance as a suit under this section, and an appeal is preferred from the decree, the appellate Court should send the suit back to the Court of first instance to be dealt with as a suit based upon title (e).

(2) Dismissal of a suit under this section does not of itself raise any presumption that the defendant was in fact in possession. *Itayila Kottayya v Udilanti Subbanna*, 120 I C 341, A I R 1929 Mad 784.

(a) Where the defendant traps crops at the decree for possession he may not set up title as a defence to a suit for the value of the crops. *Munna Singh v Ganga Singh*, 41 All 108, 48 I C 422.

(b) *Lachman v Shamshu Varma* (1911) 33 All 171, 180, 7 I C 405 (1 B).

(c) *Ganesha Das v Phooli Das* (1924) 46 All 803, 82 I C 321 and cases referred to in next par; *Ganesha v Datta*, 25 All L J 857; 103 I C 478; A I R 1927 All 670.

(d) *Lachman v Shamshu Varma* (1911) 33 All 171; 7 I C 405, *Lachman v Lachman* (1912) 35 All 448.

(e) *Varma Das v Hosi Singh* (1918) 41 All 637; 46 I C 925.

**Who may sue under this section**—It is only a person who has had “juridical” possession that may sue under this section. Therefore, a trespasser who has been dispossessed is not entitled to sue under this section (f). For the same reason a person claiming that he was in possession “as representing his father and his uncle” cannot sue under this section (g). Though a tenant may hold over after the expiry of the period of tenancy, his possession is still juridical, and he is entitled to sue his landlord for possession under this section, if forcibly dispossessed by him (h). When a tenant is dispossessed by a third person he is the proper party to sue under this section (i). But if the tenancy has terminated after the date of dispossession, the landlord may sue under this section (j). Likewise if the tenant will not sue, the landlord may sue and join the tenant as a defendant (k).

**Who may be sued under this section**—A alleging that B and C dispossessed him of certain land sues them for possession under this section. B alleges that the land belongs to D and that he is D’s manager. C alleges that he is the lessee of the land under D. The suit is properly brought against B and C, they being the persons who A alleges dispossessed him. D is not a necessary party to the suit (l).

“Dispossessed”—The mere cutting of a couple of bundles of grass does not necessarily amount to dispossession within the meaning of this section (m) nor can A be said to be dispossessed by B if B prevails upon A’s tenants not to pay the rent to A and receives the rent himself (n).

**Immovable property**—There is a conflict of decisions as to whether the expression “immovable property” in this section includes incorporeal rights e.g., a right to fish in a khal the soil of which does not belong to the person claiming the right. The High Courts of Bom

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| (f) <i>Amiruddin v Mahamad</i> (1891) 15 Bom 685 But see <i>Tamizuddin v Ashrub Ali</i> (1904) 31 Cal 647, at p 656  | A I R 1926 Mad 18  |
| (g) <i>Artillo Lall v Rajendro Narain Deb</i> (1895) 22 Cal 562  | (j) <i>Jagannatha v Rama Rayer</i> (1905) 28 Mad 238   |
| (h) <i>Rudrappa v Narsingrao</i> (1905) 29 Bom 213   | (k) <i>Ratanlal Ghelabhai v Amarsing Rupsan</i> (1929) 53 Bom 773, 122 I C 54                    |
| (i) <i>Virjivandas v Mahomed Ali Khan</i> (1881) 5 Bom 208, 211-12 There is no real authority to the contrary. <i>Veera swami Mudali v Venkatachala Mudali</i> (1925) 92 I C 20, 50 Mad L J 102, | (l) <i>Virjivandas v Mahomed Ali Khan</i> (1881) 5 Bom 208, 214 217                              |
|  | (m) <i>Virjivandas v Mahomed Ali Khan</i> (1881) 5 Bom 208 221 nor it would seem for any purpose |
|  | (n) <i>Jarain Mohun v Gunga Prasad</i> (1837) 14 Cal 649   |

S R A  
S 9

bay (o) and Madras (p) have held that it does. On the other hand it has been held by a Full Bench of the Calcutta High Court that it does not (q). According to the latter Court, the expression "immovable property" in this section refers only to such properties of which physical possession can be given as contemplated by s 5, cl (a) of this Act.

"Otherwise than in due course of law"—A person is said to be dispossessed otherwise than in due course of law "if he is dispossessed by another acting of his own authority and without the intervention of a Court of law. The words due course of law are not merely equivalent to the word legally, for a thing which is perfectly legal may still be by no means a thing done "in due course of law. The expression due course of law means the regular, normal process and effect of the law operating on a matter which has been laid before it for adjudication. Thus though a landlord is entitled to possession of his land from his tenant after the expiry of the period of tenancy, yet if the tenant holds over he may not dispossess him of his own authority. If he does so it is competent to the tenant to sue the landlord for possession under this section (r).

"Notwithstanding any other title that may be set up in such suit"—If the suit is brought within the prescribed period that is, within six months from the date of dispossession even the rightful owner is precluded from showing his title to the land (s). It is not a defence to a suit under this section—

(i) by a mortgagee against the mortgagor that the mortgage and possession under it were obtained by the mortgagee by fraud (t)

(ii) by a tenant against the landlord that the tenant was holding over at the date of dispossession (u)

(o) *Jundal v Jundal* (1889) 12 Bom 213 (right of father). *Mangaldas v Jevanram* (1891) 23 Bom 673 (right of way).

(p) *Arisadan v Alibekdas* (1890) 13 Mad 6 (right of father).

(q) *Dada Jhau v Govd Jhau Jhau* (1887) 19 Cal 511 (B); *Nandlal v Anand* (1881) 18 Cal 80 (right of father). *Janki Lal v Janki Lal* (1887) 17 Cal 616 (possession of mother).

by collecting tolls or rents)

(r) *Jalappa v Narayana* (1880) 7 Bom 213.

(s) *Prasanna v Kulkarni* (1887) 8 W R 389; *Joshi v Joshi* (1893) 7 Cal 871.

(t) *Singh v Ram* (1881) 51 M 416.

(u) *Jalappa v Narayana* (1880) 7 Bom 213.

**Order under Criminal Procedure Code, s 145**—In proceedings instituted under s 145 of the Criminal Procedure Code it is found by the Criminal Court that B and not A was in possession of certain land, and an order is made under that section declaring B to be entitled to retain possession thereof until evicted therefrom in due course of law. The order is no bar to a suit by A against B for possession under the present section. It is a mistake to suppose that after such an order A's only remedy is to institute a suit to have his title declared and possession given to him (v).

**Limits of decree under this section**—A decree under this section should be confined to directing delivery of possession to the plaintiff. The Court has no power under this section to direct the defendant to pay to the plaintiff the cost of removing huts and filling up excavations (w), nor to award mesne profits (x).

**Suit brought more than six months after dispossession**—If a suit is brought under this section within six months from the date of dispossession, all that the plaintiff has to prove to entitle him to a decree is previous possession, he has neither to allege nor prove title. If the suit is not brought until after six months from the date of dispossession, the plaintiff cannot recover on the strength merely of his previous possession, he can recover only if he proves his title to the land (y). But what if the suit is one for possession against a trespasser, that is, one who has no title to the land? Is it necessary in such a case for the plaintiff to succeed that he should prove his title, or is it sufficient if he proves his previous possession? On this point there is a conflict of decisions between the High Courts of Bombay, Allahabad and Madras on the one hand, and the High Court of Calcutta on the other hand. According to the Bombay (z), Allahabad (a) and Madras (b) High Courts, the plaintiff is entitled to succeed if he proves his previous

(v) *Juala v Ganga Prasad* (1908) 30 All 331, *U Kyaw Lu v U Shwe So* (1928) 6 Ran 667, 114 I C 543, A I R 1929 Ran 21.

(w) *Tilak Chandra v Fatil Chandra* (1898) 25 Cal 803.

(x) *Ma Agre Bura v Maung Po Maung* (1927) 5 Ran 123, 101 I C 630, A I R 1927 Ran 142.

(y) *Wise v Amerasingh* (1880) L. R.

7 I A 73 80-81. Cp *Mashal Singh v Ahmad Hussain* (1927) 50 All 86, 103 I C 363, A I R 1927 All 531.

(z) *Krishnarav v Varadav* (1884) 8 Bom 371.

(a) *Wali Ahmed v Ajudhia Kandu* (1891) 13 All 537. *Umrao Singh v Pampji Das* (1914) 36 All 51, 22 I C 622.

(b) *Narayan Pore v Dharmachar* (1903) 26 Mad 514.

S. R. A.  
S 9

possession, it is not necessary for him either to allege or prove his title. According to the Calcutta decisions, the plaintiff is not entitled to succeed if he merely proves his previous possession for the plaintiff to succeed he should allege and prove his title at the least possessory title *i.e.*, possession for twelve years (c). The distinction between the two conflicting views may be explained by an illustration. A, alleging that he had been in quiet and undisturbed possession of certain land for eleven years and six months and that he was forcibly ousted from possession by B who never had any title to the land at all, sues B, 8 months after the date of dispossession for possession. A has no title to the land at all but it is proved that he had been in possession as alleged. B also has no title of any kind to the land (d). Is A entitled to a decree? According to the Bombay, Allahabad and Madras decisions he is. These Courts proceed upon the principle of English Law also recognised in India (e) that possession is a good title against all but the true owner and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses and they hold that this principle is not in any way affected by the provisions of the present section. According to the Calcutta High Court, A's possession being for a period less than 12 years he is not entitled to possession though B has no title. According to that Court the only case in which a plaintiff having no title can succeed against a trespasser on the strength of his previous title is that provided for by the present section and that unless the suit is brought within 6 months from the date of dispossession he is not entitled to any relief. We are inclined to think that the correct view is the one taken by the Bombay, Allahabad and Madras High Courts in accordance with English doctrine as now settled, and that the present section cannot be held to take away any remedy available to a party on the strength of his previous possession.

**Non-occupancy raiyat**—A non-occupancy raiyat who has been deprived from his holding may bring a possession suit under this

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| (c) <i>Nani Chand v. Fanchiram</i> (1872) 20 Cal 53; <i>Dela Chand v. Jorai Chand</i> (1872) 9 Cal 29; <i>Jai Lal v. Jai Lal</i> (1872) 9 Cal 120; <i>Jamshed v. Jai Lal</i> (1872) 17 Cal 107. | (d) <i>Jamshed v. Jai Lal</i> (1872) 17 Cal 107; 217, 223; <i>Jamshed v. Jai Lal</i> (1872) 12 All 517; L. J. 101; A. 100, 123; <i>Jamshed v. Jai Lal</i> (1872) 17 Cal 107. |
| (e) <i>Jamshed v. Jai Lal</i> (1872) 17 Cal 107; 12 All 517; 217, 223; <i>Jamshed v. Jai Lal</i> (1872) 12 All 517; L. J. 101; A. 100, 123.   |  |

section within 6 months from the date of dispossession or he may bring an action upon title, in which case the suit may be brought either within 6 or 12 years as provided for in art 120 or art 112 of the Limitation Act. It is a mistake to suppose that he has no right or title to his land, and that the only remedy open to him is that provided by the present section. He has a title to the land, his title being that of a tenant of the land (f)

**Appeal**—The term “suit” in this section includes a proceeding in execution of a decree passed in a suit under this section, no appeal therefore lies from an order made in execution proceedings (g)

### (b) *Possession of Moveable Property*

10. A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure

**Explanation 1**—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled

**Explanation 2**—A special or temporary right to the present possession of property is sufficient to support a suit under this section

#### *Illustrations*

(a) A bequeaths land to B for his life with remainder to C. A dies. B enters on the land but C without B's consent obtains possession of the title deeds. B may recover them from C. [Common learning in England.]

(b) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A without having paid or tendered the amount of the loan sues B for possession of the jewels. The suit should be dismissed as A is not entitled to their possession whatever right he may have to secure their safe custody. [See *Donald v Suckling* (1866) L. R. 1 Q. B. 585.]

(c) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B. [*Oliver v Oliver* (1861) 11 C. B. N. S. 139. 132 R. R. 505.]

(d) A deposits books and papers for safe custody with B. B loses them and C finds them but refuses to deliver them to B when demanded. B may recover them from C subject to C's right if any, under Section 168 of the Indian Contract Act 1872.

(f) *Tamir-uddin v Ashrub* (1904) 31 Cal 647 [F. B.]

(g) *Kanas Lal v Jatindra Nath* (1918) 45 Cal 519. 42 I. C. 711

S. R. A.  
S 9

possession it is not necessary for him either to allege or prove his title. According to the Calcutta decisions, the plaintiff is not entitled to succeed if he merely proves his previous possession for the plaintiff to succeed he should allege and prove his title at the least possessory title *i.e.*, possession for twelve years (c). The distinction between the two conflicting views may be explained by an illustration. A alleging that he had been in quiet and undisturbed possession of certain land for eleven years and six months and that he was forcibly ousted from possession by B who never had any title to the land at all sues B 8 months after the date of dispossession for possession. A has no title to the land at all but it is proved that he had been in possession as alleged. B also has no title of any kind to the land (d). Is A entitled to a decree? According to the Bombay Allahabad and Madras decisions he is. These Courts proceed upon the principle of English law also recognised in India (e) that possession is a good title against all but the true owner and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses and they hold that this principle is not in any way affected by the provisions of the present section. According to the Calcutta High Court, A's possession being for a period less than 12 years he is not entitled to possession though B has no title. According to that Court the only case in which a plaintiff having no title can succeed against a trespasser on the strength of his previous title is that provided for by the present section and that unless the suit is brought within 6 months from the date of dispossession he is not entitled to any relief. We are inclined to think that the correct view is the one taken by the Bombay, Allahabad and Madras High Courts in accordance with English doctrine as now settled and that the present section cannot be held to take away any remedy available to a party on the strength of his previous possession.

**Non-occupancy riyat**—A non occupancy riyat who has been dispossessed from his holding may bring a possessory action under this

(c) *Vivek Chand v. Kaneech ram* (1899) 10 Cal 579. *Debi Churn v. Isur Chunder* (1887) 9 Cal 39. *Fraida Hussein v. Binj Mistry* (1887) 9 Cal 120. *Purmeswar v. Pooja Lal* (1890) 17 Cal 256.  
(d) *See* (1891) 13 All 537, 539 and 1111. *Illustration Art. Art. 147*.  
(e) *Imraj v. Narayan* (1887) 6 BCR 215, 223. *Sundar v. Iartals* (1887) 12 All 51, 56. L. R. 16 I A 180, 193; *Imraj v. Mahomed Chous* (1893) 10 Cal 831, 810, 813; L. R. 20 I A 97, 100.

section within 6 months from the date of dispossession, or he may bring an action upon title, in which case the suit may be brought either within 6 or 12 years as provided for in art. 120 or art. 142 of the Limitation Act. It is a mistake to suppose that he has no right or title to his land, and that the only remedy open to him is that provided by the present section. He has a title to the land, his title being that of a tenant of the land (f).

**Appeal.**—The term “suit” in this section includes a proceeding in execution of a decree passed in a suit under this section; no appeal therefore lies from an order made in execution proceedings (g).

### (b) Possession of Moveable Property.

10. A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure.

**Explanation 1.**—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

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#### Illustrations

(a) A bequeaths land to B for his life, with remainder to C. A dies. B enters on the land, but C, without B's consent, obtains possession of the title-deeds. B may recover them from C. [Common learning in England.]

(b) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody. [See *Donall v. Suckling* (1866) L. R. 1 Q. B. 585.]

(c) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B. [*Oliver v. Oliver* (1861) 11 C. B. N. S. 139; 132 R. R. 505.]

(d) A deposits books and papers for safe custody with B. B loses them and C. finds them, but refuses to deliver them to B. when demanded. B. may recover them from C, subject to C's right, if any, under Section 163 of the Indian Contract Act, 1872.

(f) *Tamiruddin v. Ashrub* (1904) 31 Cal. 647 [F. B.]

(g) *Kanai Lal v. Jatindra Nath* (1915) 43 Cal. 519, 42 I. C. 711

S. R. A.  
S. 9.

possession, it is not necessary for him either to allege or prove his title. According to the Calcutta decisions, the plaintiff is not entitled to succeed if he merely proves his previous possession for the plaintiff to succeed he should allege and prove his title, at the least possessory title, i.e., possession for twelve years (c). The distinction between the two conflicting views may be explained by an illustration. A, alleging that he had been in quiet and undisturbed possession of certain land for eleven years and six months and that he was forcibly ousted from possession by B, who never had any title to the land at all, sues B 8 months after the date of dispossession for possession. A has no title to the land at all, but it is proved that he had been in possession as alleged. B also has no title of any kind to the land (d). Is A entitled to a decree? According to the Bombay, Allahabad and Madras decisions, he is. These Courts proceed upon the principle of English Law, also recognised in India (e), that possession is a good title against all but the true owner and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses, and they hold that this principle is not in any way affected by the provisions of the present section. According to the Calcutta High Court, A's possession being for a period less than 12 years, he is not entitled to possession though B has no title. According to that Court, the only case in which a plaintiff having no title can succeed against a trespasser on the strength of his previous title is that provided for by the present section, and that unless the suit is brought within 6 months from the date of dispossession, he is not entitled to any relief. We are inclined to think that the correct view is the one taken by the Bombay, Allahabad, and Madras High Courts in accordance with English doctrine as now settled, and that the present section cannot be held to take away any remedy available to a party on the strength of his previous possession.

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(c) *Visa Chand v. Kanchiram* (1859) 20 Cal 579. *Debi Churn v. Jeeur Chunder* (1882) 9 Cal 39. *Fr'a a Hossein v. Looj Mistry* (1882) 9 Cal 130. *Jurmeswar v. Iryoo Lall* (1890) 17 Cal 259.

(d) *See* (1871) 13 All 37, 539, and Limitation Act Art 14.

(e) *Demraj v. Narayan* (1882) 6 Bom 215 223. *Sundar v. Jurbah* (1889) 12 All 51, 56. 1 R 10 I A 186 193. *Imam Ali v. Mahomed Ghous* (1893) 20 Cal 831, 842 843. 1 R 20 I A 69, 106 107.

section within 6 months from the date of dispossession, or he may bring an action upon title in which case the suit may be brought either within 6 or 12 years as provided for in art 120 or art 112 of the Limitation Act. It is a mistake to suppose that he has no right or title to his land, and that the only remedy open to him is that provided by the present section. He has a title to the land, his title being that of a tenant of the land (f)

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### (b) Possession of Moveable Property.

**10.** A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure

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(b) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A without having paid or tendered the amount of the loan sues B for possession of the jewels. The suit should be dismissed as A is not entitled to their possession whatever right he may have to secure their safe custody. [See *Donall v. Suckling* (1866) L. R. 1 Q. B. 580.]

(c) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B. [*Oliver v. Oliver* (1861) 11 C. B. N. S. 139. 132 R. R. 500.]

(d) A deposits books and papers for safe custody with B. B loses them and C finds them but refuses to deliver them to B when demanded. B may recover them from C subject to C's right if any, under Section 168 of the Indian Contract Act 1872.

(f) *Tamiruddin v. Ashrub* (1904) 31 Cal 647 [F. B.]

(g) *Kanas Lal v. Jatindra Nath* (1918) 45 Cal 519. 42 I. C. 711.

S. R. A  
Ss. 10, 11.

(e) A, a warehouse keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

**Illustrations to the section**—It will be observed that the foregoing illustrations are illustrations in the strictest sense, examples of the various cases to which the procedure can be applied. So far as they state or involve propositions of substantive law those propositions have no special connexion with the Act.

As to ills (d) and (e), see Contract Act, 1872, s. 180, p. 556, above.

**Recovery of specific movable property.**—Secs. 10 and 11 embody the English rules as to detinue. An action in detinue would only lie for some *specific* article of movable property capable of being recovered in specie and of being seized and delivered up to the winning party (h).

**11.** Any person having the possession or control of particular articles of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

Liability of person in possession, not as owner, to deliver to person entitled to immediate possession

- (a) when the thing claimed is held by the defendant as the agent or trustee of the claimant,
- (b) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed,
- (c) when it would be extremely difficult to ascertain the actual damage caused by its loss,
- (d) when the possession of the thing claimed has been wrongfully transferred from the claimant

*Illustrations—*  
of clause (a)—

A, proceeding to Europe, leaves his furniture in charge of B as his agent during his absence. B, however, sells it to C, and C, knowing B's position, purchases it for sale as A's trustee.

[Here it is not material whether the furniture has any peculiar or

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(h) *Fadu Jhala v. Gour Mohan Jhala* (1892) 19 Cal. 544; *55 Cal. 571*; *Murugesu v. Jayaram* (1899) 22 Mad. 499. (i) If C, were acting in good faith he would be protected by s. 178 of the Contract Act.

intrinsic value' or not: *Wool v Powell* (1844) 3 Hare 301 (1847) 2 Ph 393 64 R R 303]

of clause (1)—

Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A [Cf. *Fry on Specific Performance*, §§ 79-82]

of clause (c)—

A is entitled to a picture by a dead painter and a pair of rare China vases. B has possession of them. The articles are of too special a character to bear an ascertainable market value. B may be compelled to deliver them to A.

[The China vases are derived from *Fakie v Gray* (1899) 4 Drew 601, 113 R R 493. Whether the painter is alive or dead seems immaterial.]

**Restitution of chattels**—It is hard to see on principle why the right should be confined to special categories. The framers of the Act seem to have forgotten that the Indian Courts are not merely Courts of English equitable jurisdiction. In England a person entitled to the immediate possession of a specific chattel was in principle entitled to recover it by an action of detinue. The writ in that action demanded specific delivery. But owing to the defective procedure for the execution of common law judgments, this could not in practice be enforced. Then a court of equity, when applied to for relief, had to be satisfied that the remedy in damages to the value of the goods, which alone was available for the plaintiff at common law, would not be adequate, or that some specially equitable right of the plaintiff's, under a trust for example, was involved. Under a more rationally developed system the burden would be on the defendant to show cause why it should not be just and equitable to award specific restitution.

**Possession**—A plaintiff is not entitled to a decree under this section unless he alleges and proves that the defendant is in possession (j).

**Execution**—As to the execution of a decree for specific movable property, see the Code of Civil Procedure, 1908 O 21, r 31.

## CHAPTER II

### OF THE SPECIFIC PERFORMANCE OF CONTRACTS

**Introduction to Chapter II**—The jurisdiction of the English Court of Chancery to decree specific performance of contracts was founded, as we have already said, on the want of an adequate remedy at law. If the conception of equitable remedies had been maintained with logical

(j) *Venkatasubba Rao v The Asiatic S N Co* (1916) 39 Mad 1, 10-11, 39 I C 840 [F B].

S R A.  
Ch II

strictness, the Court would have held itself bound to examine each individual case with an open mind before deciding whether an extraordinary remedy was called for. But after the Court of Chancery was recognised as a regular and ordinary Court it was impossible to affect such an attitude, and it became the settled rule that in certain classes of cases the nature of the case itself was ground enough for the Court's interference.

**Presumption as to contracts to convey land**—Accordingly we find that a contract for the sale or letting of land is presumed to be a fit subject matter for the exercise of the jurisdiction we are now considering. It is said indeed that the remedy of specific performance is discretionary—the residual amount of truth in this at the present day is that the plaintiff must show himself actively willing to perform his part of the contract and that some defences are admissible which are not or under the older practice were not admitted in an action at common law for damages (1). None the less the broad result in the modern doctrine of courts of equity, is that specific performance is a normal remedy in suits on contracts for the sale or letting of land, but is awarded on contracts of other species only when exceptional circumstances make it proper to do so. One reason why this doctrine does not in general extend to a sale of goods is that regularly a complete contract for the sale of ascertained goods transfers the property at once to the buyer who thereupon has all the ordinary legal rights and remedies of an owner—see ss 19, 20 of the Sale of Goods Act, 1930. Another and more extensive one is that where the goods are of a kind purchasable in the market whether the contract is for specific goods or not compensation in money is an adequate remedy—the successful plaintiff can if he chooses employ the damages awarded to him in buying goods equivalent to those contracted for.

Further, it was held that if the vendor of property was compellable in a Court of Equity to perform his contract he must also be entitled to come to the Court, though merely seeking payment of his purchase money—this was commonly accounted for as being required by the principle of 'mutuality'—in order to give a right corresponding with that which is given to a purchaser' (2).

(1) Cf. 1 Black. Law of Fraud in *Direct London & Westminster & City*  
British India 1 p 111-12. (1871) 11 B & C at p 14 211-12

(2) See Lord Cranworth in *Webb v* at p 107

**Treatment of the subject in English books.**—The literature of specific performance has been swelled, in England, with much matter that really belongs to the general law of contract, the reason being that Courts of Equity were little concerned, at least until very recent times, with matters of current commercial business, and equity practitioners regarded only those species of contracts which usually occurred in dealings with land and with trust estates. Instead, therefore, of assuming as a matter of course that there were general and known conditions for the validity of any contract, and a plaintiff claiming specific performance must first show that those elementary conditions were satisfied, they expected the text writer who provided for their particular convenience to explain all that a plaintiff in a specific performance suit had to prove, as if there were no other kinds of contracts in the world. Part III of Sir Edward Fry's classical treatise is entitled "Defence to the Action" and covers nearly 100 pages. It may be said without much hesitation that from two thirds to three-quarters of its contents are concerned merely with the general law of contracts as understood in courts of equity. One may add that many rules and principles which were supposed to be mysteries of equity have now turned out to be very good common law. But, as Sir Edward Fry said in the preface of his first edition more than seventy years ago, the text writer had to consider what a lawyer—that is, a practising lawyer in the old Court of Chancery—would expect to find in his book.

**Treatment in British Indian Law.**—In India we are free from these anomalies. The substantive rules determining the existence of a valid contract are laid down in the Contract Act and explained and further illustrated in their places in the foregoing commentary, it will therefore be sufficient to refer to the appropriate sections of the Contract Act so far as convenient, for matters which are presumed by the rules more particularly relating to specific performance, but are not part of them. One could wish, however, that the Specific Relief Act had not in many places adopted the language of old fashioned English books.

Moreover the doctrine of the English Courts relating strictly to the remedy of specific performance has been purposely simplified in India, and further (though not yet enough) lightened by the suppression of technical subtleties and difficulties created partly by the Statute of Frauds and partly by the artificial methods of reasoning to which the Court of Chancery resorted to defend or enlarge its juris-

S. R. A.  
Ch. II.  
S. 12.

diction. A certain number of Indian practising lawyers have had to read of these technicalities in English books (*m*); the best thing they can do is to forget them as thoroughly as possible for Indian purposes

(a) *Contracts which may be specifically enforced (n)*

12. Except as otherwise provided in this Chapter the specific performance of any contract may in the discretion of the Court be enforced—

Cases in which  
specific perform-  
ance enforceable

- (a) when the act agreed to be done is in the performance, wholly or partly, of a trust;
- (b) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;
- (c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or
- (d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

*Explanation.*—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money (*o*), and that the breach of a contract to transfer moveable property can be thus relieved.

*Illustrations—*

of clause (a)—

A holds certain stock in trust for B. A wrongfully disposes of the stock. The law creates an obligation on A to restore the same.

(*m*) A concise and rational view of the English doctrine in its English form may be found in F. W. Maistland, *Equity and the Forms of Action*, Camb 1909, Lect 19.

(*n*) There is nothing here or in s. 21 to take away existing jurisdictions, *e.g.*, that of a Small Cause Court, to order payment of a sum due under an award (really not specific performance at all) *Maung Aye v Maung Aung Ba* (1926) 4

Ban 227, 97 I. C. 1032, A I R 1926 Rang 198. One would have thought this too elementary to be disputed even by a Burmese pleader.

(*o*) But where there is evidence that money compensation would be adequate, and the fact is so found, specific performance cannot be decreed. *Pamji v Jas Atharsingh*, I. R. 56 I A 280; 57 Cal. 509, 117 I. C. 1, A I R 1920 P C 190.

quantity of stock to B, and B may enforce specific performance of this obligation (p)

of clause (b)—

A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare China vases. A may compel B specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non performance.

[The China vases are suggested by *Falcke v Gray* (1859) 4 Drew 651, 113 R. R. 493.]

of clause (c)—

A contracts with B to sell him a house for Rs. 1,000. B is entitled to a decree directing A to convey the house to him, he paying the purchase money.

In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway company contracts with Z to make an archway through their railway to connect lands of Z severed by the railway, to construct a road between certain specified points to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. Z is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money, and the Court may appoint a proper person to superintend the construction of the archway, road, siding and wharf.

[See *Storer v G. W. R. Co.* (1842) 2 Y. & C. C. C. 48, 60 R. R. 23.]

A contracts to sell, and B contracts to buy, a certain number of railway shares of a particular description. A refuses to complete the sale. B may compel A specifically to perform this agreement, for the shares are limited in number and not always to be had in the market and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

[See Commentary below.]

A contracts with B to paint a picture for B, who agrees to pay therefor Rs. 1,000. The picture is painted. B is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

of clause (d)—

A transfers without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent, and C is appointed his assignee. B may compel C to endorse the note, for C has succeeded to A's liabilities and a decree for pecuniary compensation for not endorsing the note would be fruitless.

[Involved in *Watkins v Maule* (1840) 2 J. & W. 242. There the assignee's endorsement was voluntary and the Court answered an objection to its validity by saying that he was not only entitled but bound to endorse.]

**Immovable property.**—The wording of this section bears the marks of the peculiar English history. In a rational order the explanation, which is really the most important operative part of the enactment, would come first, and we should be told in a more direct manner that in a suit to enforce a contract to transfer immovable property the Court (the contract being otherwise good and enforceable) will grant specific performance unless special reason to the contrary appears, but for

(p) This illustration is repealed wherever the Indian Trusts Act, 1882, is in force see Act II of 1882, ss. 1 and 2.

S. R. A.  
S. 12.

breach of other kinds of contracts only when special reason for it is shown. It is common learning and practice that the plaintiff must have been ready and willing at all times to carry out the contract (q).

The benefit of an ordinary contract for the sale of land being assignable, the purchaser's personal qualifications are not material, and the fact that the real buyer was an undisclosed principal is no answer to an action by him for specific performance (r).

This section is applicable to contracts to transfer immovable property by way of security, if it is proved that relief by way of damages would not be adequate (s).

**Movable goods**—A contract to deliver specific goods will be enforced by way of specific performance if they are "articles of unusual beauty, rarity and distinction" (*Kindersley v C*, in *Falcke v Gray* (t)), or of special value to the party suing by reason of personal or family associations or the like. The principle is not confined to cases of contract, and indeed the illustrations of it most commonly quoted are furnished by decisions in which contract was not an element at all (u). It may be that in a contested case where specific performance is sought the dispute between the parties is only as to what is included in the contract, the decision in such a case is really an authority only on the points of construction which were in dispute (v). In fact we do not often meet with claims to specific performance of a contract to sell and deliver goods in modern practice. As lately as 1909 in Canada specific performance was sought (in an action turning mainly on questions of construction) of a continuing contract by a coal company to deliver coal of a specified quality to steel works. This part of the claim was

(q) But if he sues for performance as he construes it, and that construction is held wrong he may still have performance according to the true construction as found by the Court. *Berners v Fleming* [1925] Ch 264, C.A. where the defendant had offered so to perform and had not withdrawn the offer.

(r) *Dyer v Janfall* [1926] Ch 932, 934.

(s) *Hukumchand Kashmal v Isner Mills Co* (1911) 2 Luck 219, 99 I C 433, A I R 1927 Outh 53. *Parthua*

*nissa v Fiazad Hussain* (1930) 125 I C 169, merely follows this.

(t) 4 Drew at p 658, 113 R R at p 496.

(u) Fry on Specific Performance § 79.

(v) Thus in *Thorn v Commins of Horle* (1863) 32 Beav 490, 134 L R 434 the subject matter of the contract was stone from a disused bridge 11 by the cubic foot, the sellers wanted the buyers to take all they had offered the buyers to take 145. Evidently there was no question of artistic or historical value.

somewhat summarily dismissed by the Judicial Committee (w) It was not alleged that coal of the special quality which the steel working company contracted for, and on which they had a right to insist, could not be obtained elsewhere Justice, therefore, was done by holding the steel company entitled to rescind the contract and to be compensated in damages for loss already incurred Whether a contract to deliver something produced on the seller's land and not elsewhere can be specifically enforced is a question which, so far as known to the present writer, has not occurred for decision

The Court will, if necessary, enforce the specific execution of provisions made by agreement between partners dissolving partnership as to the separate ownership of trade books or the like which were partnership property No question could be raised at this day about the jurisdiction (x) Such a division of property is not a sale, but the principle applicable is the same in substance the objects are of little or no value except to the party entitled, and to him they have a value for which there is no definite measure We do not speak here of the right to restrain disclosure of trade secrets, which is a different matter

As to sale of other kinds of property.—Specific performance of a contract to sell a share in a partnership business may be enforced (y) It is easy to see that an award of damages in such a case would be merely speculative The right to be admitted a partner by nomination under a power conferred by the partnership agreement has some similar incidents but is not of the same class (z)

Sales of stocks or shares —A contract to sell Government stock or any stock for which there is a regular market is not a proper subject for specific performance, for the same reason that a contract to sell and deliver ordinary marketable goods is not But this does not apply to the transfer of shares in companies for which there is not a notorious market (a) It is to be observed that in such cases the Court has no

(w) *Dominion Coal Co v Dominion Iron & Steel Co* [1909] A C 293

(x) *Langen v Simpson* (1824) 1 Sim & St 600, 24 R R 249 The report does not look as if the point was really thought arguable.

(y) *Dodson v Downey* [1901] 2 Ch 620 no dispute as to the jurisdiction, the only question argued and decided being on the

purchaser's duty to indemnify the vendor

(z) See p 708, above

(a) *Duncuft v Albrecht* (1841) 12 Sim 46, 56 R R 46 appears to be the earliest authority It would hardly be followed now so far as it assumes railway shares not to be marketable Consolidated stock representing original share or loan capital was at the time unknown.

S R A.  
S 12

administrative difficulties to face, as it only has to order the seller to execute the proper transfer and do whatever is necessary on his part to authenticate it by registration. The jurisdiction is analogous to that which deals, as we have just noticed, with the transfer of a share in a private partnership. As for the details of such transaction they belong to the special law of companies and depend largely on local usage.

**Agreements to lend money**—See notes to s 21, clause (a) p 790 below

**Contracts to execute building or other works**—It is not a convenient course to decree specific performance of a contract such that the execution of the work contracted for would necessarily be prolonged and the work of a kind which a court of justice has not the means of supervising. Therefore it has long been the rule in England that the Court will not usually grant this remedy on a contract for building or engineering work. But there are special circumstances which will induce the Court to make an exception. In one important class of cases a purchaser of land has covenanted as part of the consideration on his side to build or execute specified works on that land. Such an undertaking will be enforced if the following conditions are satisfied (1) the work to be done must be defined with sufficient exactness for the Court to know what it is requiring to be performed (2) the party seeking performance must have a substantial interest of such a nature that damages would not be an adequate compensation (3) the defendant has by the contract obtained possession of land on which the work is contracted to be done (b). The law has been so clearly laid down by the Court of Appeal to the effect just stated that it is of little use even in England to go back to the older authorities (c).

Further specification and illustration of cases in which specific performance is not granted will be found in s 21, below

**"Discretion of the Court"**—See notes to s 22, below

**Decree for specific performance**—As to execution of decrees for specific performance and decrees for the execution of a document see Code of Civil Procedure 1908 O 31 rr 32-34

(b) *Romer J* in *Waterkamp v Corporation of London* [1901] 1 K B 515 522

(c) See *Kekewich J*'s remarks in *McLynn v Pickard* [1904] 1 Ch 344

This was the case of a covenant in an ordinary lease to build a house of a kind specified by reference to similar works already done

**Suit to obtain the benefit of a lost deed.**—Where a writing that has been executed is lost, the proper course of proceeding is not by a suit requiring the defendant to execute a fresh writing, but by a suit to restore the terms of the lost writing. In an Allahabad case, Stuart C.J. observed that there was no doubt that such a suit could be instituted in this country (*d*)

### 13. Notwithstanding anything contained in section 56

**Contracts of** of the Indian Contract Act, a contract is not  
**which the subject** wholly impossible of performance because a  
**has partially** portion of its subject-matter, existing at  
**ceased to exist** its date, has ceased to exist at the time of the performance

#### *Illustrations*

(a) A contracts to sell a house to B for a lakh of rupees. The day after the contract is made, the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase money.

[*Paine v Weller* (1801) 6 Ves 319.]

(b) In consideration of a sum of money payable by B, A contracts to grant an annuity to B for B's life. The day after the contract has been made, B is thrown from his horse and killed. B's representative may be compelled to pay the purchase money.

[*Mortimer v Caffer* (1782) 1 Bro C C 156 (c).]

### **Notwithstanding anything contained in s 56 of the Contract Act.**—

This section appears to have been thought necessary by reason of the very wide language used in the section of the Contract Act referred to. It would perhaps have been superfluous if the second paragraph of I. C. A., s 56, had read, with greater exactness, "a promise to do an act which, after the contract is made, becomes impossible," etc. The effect of such an event on the other party's obligations and on the agreement as a whole cannot be disposed of in a universal proposition. Still the paragraph in question, if read with reasonable regard to the general intention and to the illustrations, does not affirm any such general proposition as the Specific Relief Act denies.

**Illustrations.**—That which the illustrations really illustrate is the rule that as soon as a contract of sale is concluded the buyer, unless it is expressly agreed otherwise, takes as between the parties all the rights

(d) *Maya Puri v Pray Das* (1882) 5 All 44, 52.

drowning; the variation, whether intentional or not, is immaterial.

(e) In this case, the accident was

S R A  
Ss 13, 14

and likewise the risks of an owner. From that moment he is entitled to the benefit of an increase in the value of the object, however caused and must bear likewise any casual loss or depreciation. The rule is quite plain without any talk of possibility or impossibility and it is unfortunate that the words were introduced in this connexion.

Illustration (a) assumes that a contract for the sale of a house does, of itself, transfer the beneficial interest in the house to the purchaser, and make him owner in equity in the English phrase. This was also the law here before the Transfer of Property Act, 1882, came into force. By s 54 of that Act it is provided that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. By s 55 (5) it is enacted that the risk of destruction is borne by the purchaser only from the date when the ownership passes to him, and the ownership appears to pass on execution of a proper conveyance by the vendor [see s 55 (1) (d)]. It would, therefore, seem that the illustration cannot now be applied where the Transfer of Property Act is in force.

14. Where a party to a contract is unable to perform the whole of his part of it but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency (f)

Specific performance of part of contract where part unperformed is small

#### Illustrations

(a) A contracts to sell B a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belong to A and the two remaining bighas to a stranger who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the 98 bighas nor so important for such use or enjoyment that the loss of them may not be made good in

(f) Ss 14-17 are a complete code as to specific performance of part of a contract. Any claim for such relief must be brought within their terms. *Crisham v Krishna Chander Dey* (1904) L. J. 221 A. C. 22 Cal 330 80 I. C. 232

A. I. R. 1925 I C 45 followed in *Monah W. v. Cutha Behari* (1924) 33 C. W. N. 214 118 I. C. 817; A. I. R. 1929 Cal 380 (where the Court explained that the decree affirmed was not for specific performance at all).

money (g) A may be directed at the suit of B to convey to B the 98 bighás and to make compensation to him for not conveying the two remaining bighás, or B may be directed, at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase money, less a sum awarded as compensation for the deficiency

(b) In a contract for the sale and purchase of a house and lands for two lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The Court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house

[*Richardson v Smith* (1870) L. R. 5 Ch. 648 here the discretion of the Court is more broadly stated]

### Sections 14, 15 : Questions of performance with compensation —

We now come to an important group of sections dealing with classes of cases in which specific performance may be granted with or subject to special conditions or restrictions. Such cases are put by English lawyers under the rubric "Specific performance with compensation". In English practice they are confined to contracts for the transfer of immovable property, they are almost always complicated by special terms of agreement, or conditions of sale if the sale was by auction, the effect of which on the general rules has to be considered, and the arguments and judgments of course assume knowledge of English tenures, conveyancing, and habits of dealing. For these reasons alone English decisions on this subject would have to be used with great caution in India, but we shall presently see that Indian legislation has deliberately declined to follow the system of the English courts in its minuter distinctions. Moreover, the general tendency of the earlier authorities is now discredited in their own jurisdiction. In later cases strong remarks have been made by eminent judges on the unfortunate adventures of Courts of Equity in "making bargains for the contracting parties which they never would have made for themselves" (h). So much by the way of warning.

**General principles as to compensation** — The principles applicable in different kinds of circumstances in English law have been summed up concisely in a judgment of the Judicial Committee. The question for the Court is always whether the contract can be executed in sub

(g) As if they were, for example a strip including a material section of frontage. *Arnold v Arnold* (1880) 14 Ch. Div. 270.

(h) *Arnold v Arnold* (1880) 14 Ch. Div. 270, 279, 284, and see Fry on Specific Performance, s. 1217, 5th ed., p. 601.

S. R. A.  
S 14

stance "If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency provided that the vendor has not, by misrepresentation or otherwise disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get and to have a proportionate abatement of the purchase money. But this right applies only to a deficiency in the subject-matter described in the contract" (1). The decision in this case was that a purchaser could not have compensation for a misrepresentation as to the quantity of fencing on the land, that being a collateral matter not affecting the description of the thing sold. Observe that in the case of the deficiency being such that the seller cannot claim specific performance, s 15 of the Specific Relief Act, departing from the English authorities, allows the buyer to claim it only on the terms of waiving any right to compensation.

The Specific Relief Act does not, of course define the conditions under which misrepresentation will in general make a contract voidable, for which see ss 18, 19, of the Contract Act, above, pp 118, 125, 197.

When compensation not admissible.—The chief difficulty in applying the rule here laid down is to know what kind or amount of shortcoming on a vendor's part will be deemed not to admit of compensation in money. As long ago as 1831 the general principle was defined (1) it is impossible to anticipate the details of individual cases) in a passage now received as classical. "Where the misdescription although not proceeding from fraud (2), is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether," and this even if there is a special condition to the

(1) *Paterson v McAdam* (appeal from New Zealand) [1917] A C 855.

(2) As to fraud see I C A s 17 and

commentary above. We are not concerned with it here.

effect that errors in description shall not annul the contract but shall be matter for compensation "The purchaser is not bound to resort to the clause of compensation" if the defect is such that he "may be considered as not having purchased the thing which was really the subject of the sale" So the Court of Common Pleas declared the law in a case where a lease was subject to much more burdensome restrictions as to the use of the premises than appeared in the particulars of sale (k) and the statement has been approved and followed ever since The test is whether the purchaser gets substantially what he contracted to buy (l) If performance with money compensation will not give him satisfaction to that extent, he is not bound to complete The words of section 14 "the part which must be left unperformed bears only a small proportion to the whole in value" do not leave, and doubtless were intended not to leave, so much discretion to the Court as results on the whole from the English authorities

### 15. Where a party to a contract is unable to perform

Specific perform  
ance of part of  
contract where  
part unperformed  
is large

the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance But the Court may, at the suit of the other party (m), direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant

(k) *Flight v Booth*, 1 Bing N C 370, 41 R R 599

(l) So all the members of the C A in nearly the same words *Fawcett and Holmes Contract* (1889) 42 Ch Div 150 The difference between being subject to one lease as described and being in fact subject to several distinct leases is substantial *Lee v Rayson* [1917] 1 Ch 613

(m) This provision is for the pur

chaser's benefit, and declining to act on it is not an improper declining to accept delivery under s 55 of the Transfer of Property Act *Sultan Kanu Rowthan v Mahomed Meera Rowthan* (1928) 115 I C 251 A I R 1929 Mad 189 (mainly on purchaser's charge under s 55 of the Transfer of Property Act) A party who does act on it may do so at any stage of the proceedings *Waryam Singh v Gopi Chand* (1929) 11 Lah 69

S. R. A.  
S. 15

*Illustrations*

(a) A contracts to sell to B a piece of land consisting of 100 bighás. It turns out that 50 bighás of the land belong to A and the other 50 bighás to a stranger who refuses to part with them. A cannot obtain a decree against B for the specific performance of the contract but if B is willing to pay the price agreed upon and to take the 50 bighás which belong to A, waiving all rights to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey those 50 bighás to him on payment of the purchase money.

(b) A contracts to sell to B an estate with a house and garden for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that A is unable to convey the garden. A cannot obtain a decree against B for the specific performance of the contract but if B is willing to pay the price agreed upon and to take the estate and house without the garden, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey the house to him on payment of the purchase money.

**Variation from English law**—This section agrees with English law in allowing a purchaser (for it is mere affectation to ignore the practically limited application of the rules) to enforce specific performance at his option under the named conditions although the vendor cannot claim it. But the Indian enactment clearly excludes in such cases any claim of the purchaser to compensation thus making a considerable and (it must be presumed) deliberate departure from English authority. If the vendor has a title to only half of what he agreed to sell the buyer can recover damages for the breach of contract but he cannot have specific performance except on the terms of paying for the whole (a). There is some reason to doubt whether in fact the draftsman of the Specific Relief Act clearly understood how much he was doing but after the lapse of half a century this is only matter of curiosity. In England the party electing to affirm the contract when he might have rescinded it is or is not entitled to claim performance with compensation according as the deficiency (not necessarily a defect in quality) in the property sold is or is not capable of valuation in money but he may further be debarred from claiming compensation by considerations arising from his knowledge of the defect or remoteness in discovering it, possible prejudice to third parties or other special circumstances. It would be useless for Indian purposes and might even be misleading to say more of complications which the British

(a) See *13 Ind. v. 111 Kishan G. Lah* *Costa v. Roberts* See (1904) 23 C. W. N. 314;  
 111 C. W. N. 422 *A. I. R. 1904 Lah* 111 C. W. N. 410 *A. I. R. 1904 Cal* 300  
 40 *C. P. 1 of Promodnath Malra v*

Indian legislature has expressly refused to admit. In the United States, so far as we are informed, the English doctrine is received in a general way, but the topic as a whole is of subordinate importance. A student of comparative law may well think it more remarkable that this peculiar learning has been adopted at all in Indian legislation than that some of its refinements have been rejected. See notes to s 14, p 767, above. This section does not enable the Court to make a new contract for the parties by splitting up the subject matter and apportioning the consideration (o).

**Contracts for sale by one of several Hindu co-parceners**—The question how far the provisions of this section apply to contracts entered into by a member of a joint Hindu family for the sale of immovable property belonging to the joint family has been discussed in several cases. These cases may be divided into the following two groups—

I. A, B and C, three brothers, are members of a joint Hindu family. A, as managing member of the family, agrees to sell certain land belonging to the family to P. B and C are not parties to the contract. P sues A, B and C for specific performance. In such a case it has been held that the suit as against B and C should be dismissed, they not being parties to the contract, but that, as against A, P is entitled to a decree directing A to convey the *entire* property to P on payment of the whole consideration, without determining whether the sale would or would not bind the interests of B and C in the property (p). Obviously the Courts thought in these cases that it was not necessary to have a distinct finding as to whether there was any necessity for the sale so as to render it binding on B and C. In later cases, which also were cases in special appeal, it has been held that if there is a finding recorded that there was no necessity for the sale, no such decree should be passed even against A, and that the suit should be dismissed altogether (q). But there is a difference of opinion as to whether if P is willing to pay the whole price and demands a transfer of A's interest alone in the property, the Court has the power under

(o) *Mahendra Nath Srivastava v. Kailash Nath Das* (1927) 55 Cal 841 856 109 I C 298. A I R 1929 Cal 50 (the decision is mainly on the validity of the contract).

(p) *Kosuri v. Ivaluri* (1903) 26 Mad 74. *Shrinivasa v. Sivarama* (1909) 32 Mad 390. No such decree can be passed

if the coparcenary has ceased and the property is held by A, B and C as tenants in common. *Gorind v. Apathsa haya* (1912) 37 Mad 403 13 I C 471.

(q) *Naga v. Venkatarama* (1912) 37 Mad 387 15 I C 623. *Dattur v. Kakuturi* (1914) 38 Mad 1187 26 I C 983.

S. R. A.  
S 15.

the present section to decree specific performance as regards A's interest, it being held in some cases that it has (r), while in others that it has not (s). In a recent Full Bench case the Madras High Court dissented from the former view and accepted the latter view (t).

II A, B, C and D are members of a joint Hindu family. C and D are both minors. A and B, and B as guardian of C and D agree to sell certain land belonging to the family to P. P sues A, B, C and D for specific performance. It is found that the contract was not for purposes binding on the minors. Here no decree can be passed against C and D, but a decree may be passed under the present section against A and B directing A and B to transfer their interest in the property on payment of the whole price. P is not entitled to a decree directing a transfer of the whole of the property (u).

It is difficult to see, as regards the application of the present section, any substantial distinction between the two classes of cases. It is submitted that in Bengal and N-W Provinces where the law does not recognise an alienation by a Hindu coparcener of his undivided coparcenary interest, no specific performance should be decreed in respect of a coparcener's interest. And even in Bombay and Madras where the law allows such an alienation, the Court, it is submitted, should not decree such performance. The reason is that such alienations are "inconsistent with the strict theory of a joint and undivided Hindu family, and the law as established in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes" (v). Even in Madras and Bombay what the law recognises is a complete transfer and not a mere contract for sale. It is, however, different when the intended alienation is one for a legal necessity.

(r) (1912) 37 Ma I 387, 389 15 I C 623  
*supra* *Lakshmanam Aiyar v Lakshmana*  
*Aiyar* (1921) 44 Ma I 605 63 I C 374

(s) (1909) 32 Mad 370, 312 *supra*  
(1914) 38 Ma I 1187 1191 1192 26 I C 187

(t) *Lakshmanam Aiyar v Lakshmana*  
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(u) *Jwalay Lal v Jwal* (1910) 33 Ma I  
370 371 C 374 11 I C 111 *supra* *Curassamy*

(1916) 40 Mad 338 340 33 I C 354  
In *Curassamy v Chinapathis* (1879) 5 Ma I  
337 [F B] the contract was made before  
the passing of the S R Act and the purchaser  
was held entitled to an abatement.  
As to the manager's liability for damages  
see 40 Ma I 338 cited above.

(v) *Surya Prasad Ayyer v The Imperial*  
*Government* (1879) L R 6 I A 48 10 I C 148 160

16. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part

Specific perform-  
ance of indepen-  
dent part of con-  
tract

**Divisible and indivisible contracts**—Whenever it is asserted on one side and denied on the other that certain obligations between the parties are so connected that it would be unjust to enforce one of them alone, the first thing to make sure of is whether there is only one contract or more than one. Not that this will always suffice for deciding the dispute, but it will put us on the road to a decision. Not that the preliminary inquiry will always be simple, it may involve doubtful matters of law, construction, or fact, but it must be capable of a definite solution.

If there is any contract, there is either one or more than one. If there is only one, it is reasonable to suppose that the parties intended it to be dealt with as a whole and not piecemeal, unless and until the contrary is shown. In technical terms, the contract is presumed to be entire. If there are more than one, the natural inference is the other way, and we shall assume that each contract may be separately and independently enforced, unless such a substantial and intimate connexion is shown between apparently distinct agreements as would make the obvious construction unreasonable. A clear and express statement of the parties' intention would of course leave no room for dispute, but such a declaration is seldom found. These observations may seem elementary even to baldness, but perhaps a little more attention to their substance might have saved some learned persons from futile perplexity, for nothing is so apt as the neglect of elementary principles to confuse the discussion of controverted and complicated facts.

Given an entire contract, its nature may be such that only part of it can, according to the general rules, be enforced by way of specific performance. It would obviously not be just to enforce that part while the other remained to be performed and could not be effectually controlled by the Court. Further, it is obvious that a court of justice cannot order a party to do that which would contravene any general

S. R. A.  
S 15.

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(r) (1912) 37 Mad 387-389, 151 C 623  
*supra* Baluswami Aiyar v Lakshmana  
Aiyar (1921) 44 Mad 605, 63 I C 374  
(s) (1909) 32 Ma 1 320-312 *supra*  
(1914) 38 Ma 1 1187, 1191-1192, 26 I C  
683

(t) Baluswami Aiyar v Lakshmana  
Aiyar (1921) 44 Mad 605, 63 I C 374

(u) *Joshi v Lalramah* (1910) 33 Ma 1  
323, 31 I C 70. *Chandrasekhar v Chandrasekhar*

(1910) 40 Mad 338-340, 39 I C 338  
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S. R. A.  
S. 16

law or be a breach of any existing personal duty Hence the carefully guarded language of s 16 For the better general understanding of the subject, we will now mention some examples of the manner in which the principles are applied in English Courts

**English examples**—It has long been settled law that on a sale by auction of an estate divided into lots there is a separate contract with the purchaser of each lot, and not the less so if the purchaser of two or more lots is the same person, so that, as a rule, a defect in the title to one lot will not affect the purchaser's obligation to take another Nevertheless there may be facts within the knowledge of both parties establishing such a connexion in use and enjoyment between two separate lots as to show that the purchaser bought them for a single purpose and would "not have taken the one, had he not reckoned upon also having the other" Whether such a state of things exists is a question of fact to be tried as such in the regular course If this is proved, the failure of the seller to convey the one lot will be a ground for the buyer to claim to be released from his contract as to the other (w) Cases of this kind are not frequent

A more usual species is that of a single instrument containing several undertakings on which the question arises whether they are separately enforceable "As a general rule all agreements must be considered as entire Generally speaking, the consideration for the whole and each part of an agreement by one party is the performance of the whole of it by the other, and if the court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of it on his part, the Court will not compel the defendant to perform his part or any part of the agreement" (x) Accordingly specific performance has been refused of an agreement to grant a lease, where the terms included the maintenance of a railway by the lessee on the land demised (y) and of a covenant in a lease to appoint a servant to perform specified duties for the benefit of occupiers (z) these being such undertakings as the Court could not superintend

There are kinds of business, however, where the needs and constant practice of the business require a different construction Where in a

(w) *Cassmajor v Strale* (1831) 2 My & K 706, 39 L R 339

(x) *Mellish v J. J. Halliwell & Clements* (1872) L. R. 8 Ch at 110

(y) *Brettell v Lees* (1866) 11 L R 117

(z) *Lyon v Westminster Chambers Association* [1893] 1 Ch 116

single agreement for a building lease the land is mapped out in plots, and the lessee undertakes to build a certain number of houses on each plot, and, when he has built and finished them to the lessor's satisfaction, is to be entitled to one or more separate leases of the respective plot, there it is held that the lessee's right to a lease of any lot, whether in his own hands or in those of an assignee, is independent of the performance of the terms as to the other lots. In fact a building lessee works with capital borrowed in instalments which he would be unable to raise as required if the lender's security depended on the fulfilment of the builder's obligations over the whole of the property (a)

Simultaneous agreements by A to sell Whiteacre to B and by B to sell Blackacre to A are not, without more, an entire contract even if recorded in one memorandum, but severable, and, according to the general rule of evidence, extrinsic evidence is not admissible to show that an exchange was intended (b)

**"Separate and independent footing."**—This element is essential. A contract of sale was made for two plots of land in the same district, of the same character, and nearly equal in area, without any distinction as to the terms and conditions. The vendor could not make a title as to one of the plots (in fact it belonged to his wife, who would not concur) and the purchaser obtained judgment in the High Court of Calcutta for performance as to the other plot with abatement of the purchase money. The Judicial Committee held that there was no evidence of the two plots being on a separate and independent footing, and that the decision below really imposed on the parties a new contract different from that which they had made, and the judgment was reversed accordingly and the contrary judgment of the trial judge restored (c)

**Where specific performance is claimed by some of several purchasers**—Where there is a single contract for the sale of immovable property by the owner thereof to several persons, specific performance cannot be decreed against the vendor at the suit only of some of those

(a) *Willinson v Clements* (1872) L R 8 Ch 96

(b) *Croome v Ledard* (1833) 2 Myl & K 251, 39 R R 195

(c) *Krishna Chandra Dey v W*

*Graham* (1923) 50 Cal 700, 75 I C 421,

*Graham v Krishna Chunder Dey* (1924) L R 52 I A 90, 52 Cal 335, 86 I C 232, A I R 1925 P C 45

S. R. A. persons, if the others refuse to join them in claiming performance The  
 Ss. 16 18. present section does not apply to such a case (d)

17. The Court shall not direct the specific performance  
 of a part of a contract, except in cases coming  
 under one or other of the three last preceding  
 sections

Bar in other cases of specific performance of part of contract

This section appears to be inserted out of abundant caution to guard against speculative extensions of the jurisdiction. Having regard to the reason of the thing, and to the language of ss. 14, 15, it does not seem applicable to a case where all the rest of the contract has already been performed. Neither can it be used, it seems to override an express agreement of the parties (e). As to the jurisdiction to restrain the breach of a negative agreement by injunction, notwithstanding that it may have the effect of enforcing part of a contract of which, as a whole, specific performance could not be decreed, see s. 57 of this Act, p. 887, below.

18. Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights —

Purchasers rights against vendor with imperfect title

- (a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest,
- (b) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence,
- (c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an

(d) *Safur Iahman v. Maharam innesa* 108 I C 401 (1897) 24 Cal 832. *Collart Bros* (1928) 1 R 55 1 A 423. The decision was that the alleged contract was not proved.

(e) Observations in *Secy of State v*

amount not exceeding the purchase money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee;

- (d) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let

**Contents of the section** — *Contract must be performed according to ability at time of performance* — Sub s (a) is really very plain justice. A seller's obligation is determined by the contract. He is bound to fulfil it if he can when he is called upon to do so and the Court will then compel him to the full extent of his present ability if it is a proper case for specific performance. The seller is likewise entitled to enforce the contract if he can make a good title at the proper time (f)

A man may, if he chooses, bind himself to sell that which he has not but expects to have in time to perform the promise. Taking the risk of failure, in the case of goods current in the market there is nothing out of the way in this. Talk about estoppel in this connexion can only make a plain matter obscure. When it occurs (g) it arises from confusion between the creation of a personal obligation and the passing of property, a confusion which was common at one time but should be carefully avoided by all students of equity who wish to keep their heads clear.

**Purchaser acquiring outstanding title** — There is one case on record where a purchaser attempted to make an unfair use of this rule. Having found an objection to the seller's title, and required it to be removed, which so far was a correct course, he broke off the negotiations and bought up the outstanding interest himself, thus making it impossible for the vendor to complete. The Court would not tolerate this sharp

(f) *Mortlock v Buller* (1804) 10 Ves at p 315, 7 R. R. at p 429

(g) There is no such thing in Fry on Specific Performance

S. R. A.  
Ss. 18, 19.

purchaser, nor any conduct on his part amounting to repudiation he is entitled to a return of the deposit, though specific performance is refused (x)

The dismissal of a purchaser's suit for specific performance is no bar to a separate suit for a return of the deposit (y) It is, however, desirable that the right to a return of the deposit should be determined in the suit for specific performance, and if the plaintiff has not in his suit for specific performance made a claim in the alternative for a return of the deposit, he should be allowed to amend the plaint, though the amendment may be asked for at a late stage of the case (z) But this cannot be done after the claim for specific performance has been dismissed (s 29, p 822, below) or abandoned by the plaintiff himself (a)

A deposit is not a penalty, but a payment in part of the purchase money, made as a guarantee that the contract will be performed It results from this that if the seller seeks to recover damages beyond the amount of the deposit, he must give credit for the deposit which he has retained Thus if it is provided by the terms of a contract that if the purchaser should fail to comply with the conditions, the deposit should be forfeited to the vendor, and that the vendor should be entitled to re sell the property and recover from the purchaser the deficiency upon re sale, the deposit though forfeited, is to be taken into account in estimating the loss on a re sale, and it is to be deducted from the deficiency upon re-sale so as to diminish the deficiency (b)

## 19. Any person suing for the specific performance of

a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a

(x) *Alokeski Dass v Hara Chand Dass* Bom 827, 851-853, *Hare v Smith* (1897) 24 Cal 897, *Ibrahimbhai v Fletcher* (1897) 21 Bom 827 [F B], *Balvanta v Bira* (1899) 23 Bom 56 60-61

(y) *Parangolan v Perumtoduka* (1904) 27 Mad 380, *Munni Babu v Kunwar Kamta Singh* (1923) 45 All 378, 72 I C 86, A I R 1923 All 321

(z) *Ibrahimbhai v Fletcher* (1897) 21

(1884) 27 Ch Div 89, 91

(a) *Manna v Sassoon* (1928) L R 53 I A 360, 111 I C 413, A I R 1928 P C 208 And see the general exposition

of the jurisdiction under this section and its relation to English law at pp 372-373

(b) *Ockenden v Henly* (1858) F B & F 485, *The Jellore Taluk Board v Gopalasami* (1917) 39 Mad 801, 26 I C 226

contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

*Explanation.*—The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.

*Illustrations*

of the second paragraph—

A contracts to sell a hundred maunds of rice to B. B brings a suit to compel A. to perform the contract or to pay compensation. The Court is of opinion that A. has made a valid contract and has broken it, without excuse, to the injury of B., but that specific performance is not the proper remedy. It shall award to B. such compensation as it deems just.

of the third paragraph—

A contracts with B. to sell him a house for Rs. 1,000, the price to be paid and the possession given on the 1st January, 1877. A. fails to perform his part of the contract, and B. brings his suit for specific performance and compensation, which is decided in his favour on the 1st January, 1878. The decree may, besides ordering specific performance, award to B. compensation for any loss which he has sustained by A.'s refusal.

of the Explanation—

A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The Court may award A. compensation for the non performance of the contract, and may, if necessary, amend the plaint for that purpose.

A sues for the specific performance of a resolution passed by the Directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award A. compensation for the non performance (c).

**Frame of the section.**—The particularity of the language is due to the fact that the jurisdiction to award damages was in the English Court

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(c) *Ferguson v. Wilson* (1866) L. R. 2 Ch. 77, shows the imperfection of the old English Chancery jurisdiction even after amendment by statute, which gave only a strictly alternative power to award damages.

S. R. A.  
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A contracts to sell a hundred maunds of rice to B. B brings a suit to compel A to perform the contract or to pay compensation. The Court is of opinion that A has made a valid contract and has broken it, without excuse, to the injury of B, but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

of the third paragraph—

A contracts with B to sell him a house for Rs. 1,000, the price to be paid and the possession given on the 1st January, 1877. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour on the 1st January, 1878. The decree may, besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.

of the Explanation—

A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The Court may award A. compensation for the non performance of the contract, and may, if necessary, amend the plaint for that purpose.

A sues for the specific performance of a resolution passed by the Directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award A compensation for the non performance (c).

**Frame of the section.**—The particularity of the language is due to the fact that the jurisdiction to award damages was in the English Court

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(c) *Ferguson v. Wilson* (1866) L. R. 2 Ch. 77, shows the imperfection of the old English Chancery jurisdiction even after amendment by statute, which gave only a strictly alternative power to award damages.

**S. R. A. Ss. 19, 20.** of Chancery a statutory novelty dating from about the middle of the nineteenth century There is no such question of limited jurisdiction in India as those which troubled courts of equity in England, and the explanation makes it clear that English precedents of that kind are wholly inapplicable

**Damages may be awarded though not asked for.**—Where the case for specific performance or injunction fails, the Court may itself award damages or order an inquiry as to damages, though no damages be asked for in the plaint (*d*)

**Explanation** —This does not mean that a plaintiff is at liberty to proceed with the claim for damages after making specific performance impossible by his own act since the commencement of the suit (*e*) Under Indian procedure a plaintiff who claims specific performance or damages in the alternative may elect between the two remedies at any time down to the hearing if he is not otherwise in default (*f*)

**Subsequent suit for damages** —The dismissal of a suit for specific performance or for an injunction is a bar to a fresh suit for damages in respect of the same cause of action (*g*)

**20. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same (*h*).**

Liquidation of damages not a bar to specific performance

#### Illustration

A contracts to grant B an under lease of property held by A under C and that he will apply to C for a license necessary to the validity of the

(*d*) *Arishna Asyar v Shamanna* (1912) 23 Mad L J 610, 617, 17 I C 497, *Callianji v Narsi* (1895) 19 Bom 764, 770, *Arya Pradeshal Pratinidhi Sabha v Lahore Mal* (1924) 5 Lah 509, 83 I C 1047, A I R 1924 Lah 713

(*e*) *Higgrate v Case* (1885) 28 Ch Div 359 the details depend on English procedure and practice, but the principle is instructive, see comments in

the case next cited

(*f*) *Karsondas Kalidas v Chhotalal Motchand* (1923) 48 Bom 259, 77 I C 275, A I R 1924 Bom 119

(*g*) See s 29, p 822, below

(*h*) Cp *Bissessar Dass Daga v Jas* 55 Cal 238 107 I C 25, A I R 1928 P C 27, the judgment of the Judicial Committee proceeded wholly on the construction of the agreement

under lease and that if the license is not procured, A will pay B Rs. 10,000. A refuses to apply for the license and offers to pay B the Rs. 10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the license.

[*Long v. Bouring* (1864) 33 Bear 685, 140 R. R. 272.]

**Penalties and damages**—This section is only remotely connected with the general rule as to consequential penalties and liquidated damages as to which see I C A, s. 74. It does not touch the case of an express contract giving an option to the promisor. If on the true construction it appears that such is the contract, it will be enforced according to its terms.

**Liquidation of damages not a bar to specific performance**—The principle of this section applies also to injunctions. Thus if a case be a proper one for an injunction, the fact that the contract contains a provision for a penalty for its non-performance is no bar to an award of relief by way of injunction (1).

### (b) *Contracts which cannot be specifically enforced*

Contracts not specifically enforceable

21. The following contracts cannot be specifically enforced—(j)

- (a) a contract for the non-performance of which compensation in money is an adequate relief, (k)
- (b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications (l) or volition of the parties, or otherwise from its nature is such,

(1) *Madras Ry. Co. v. Rust* (1891) 14 Mad 18, 22.

(j) This, of course, does not affect whatever right may exist to pursue any other remedy. *Budh Sagar v. Bishan Sahai* 47 All 327, 86 I C 554, A I R 1925 All 366.

(l) This seems too plain for any mis-understanding, but see *Ramji v. Rao Aishoresingh* L. R. 56 I A 280, 117 I C 1, A I R 1929 P C 190, where the case had been confused in the courts below by charges of unfairness and

extortion.

(k) Words equivalent to "I shall convey to you" (the original was in Tamil) do not imply that the undertaking is limited to the joint lifetime of the parties. *Munuswami Nayudu v. Sagalaguna Nayudu* 49 Mad 387, 391, 100 I C 399, A I R 1926 Mad 699. But this is really a mere question of construction and has nothing to do with any special rule of law or procedure. Being alive is not a personal qualification.

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S. R. A.  
S. 21.

[*Paris Chocolate Co v Crystal Palace Co* (1855) 3 Sm & G 119, 107 R R 49 the reason adopted in the illustration was not the only one]

to (d)—

A and B contract to become partners in a certain business the contract not specifying the duration of the proposed partnership This contract cannot be specifically performed for, if it were so performed, either A or B might at once dissolve the partnership

[*Scott v Ragment* (1868) L R 7 Fq 112 It may be otherwise if the partnership is for a defined term *Englanl v Curling* (1844) 8 Beav 129 68 R R 39]

to (e)—

A is a trustee of land with power to lease it for seven years He enters into a contract with B to grant a lease of the land for seven years with a covenant to renew the lease at the expiry of the term This contract cannot be specifically enforced

The Directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders

They contract to sell it without any such sanction This contract cannot be specifically enforced

Two trustees, A and B, empowered to sell trust property worth a lakh of rupees, contract to sell it to C for Rs 30 000 The contract is so disadvantageous as to be a breach of trust C cannot enforce its specific performance

The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property They take no proper precautions to ascertain the value of such property, and in fact agree to pay an extravagant price therefor They also stipulate that the vendors shall give them a bonus out of the purchase money This contract cannot be specifically enforced

[*Mortlock v Buller* (1804) 10 Vils 292, 7 R R 417 suggested the first and third paragraphs The second and fourth state plain cases of breach of trust or fiduciary duty]

to (f)—

A company existing for the sole purpose of making and working a railway contract for the purchase of a piece of land for the purpose of erecting a cotton mill thereon This contract cannot be specifically enforced

[This is the simplified type of an agreement *ultra vires* Such simplicity hardly occurs in practice]

to (g)—

A contracts to let for twenty one years to B the right to use such part of a certain railway made by A as was upon B's land and that B should use the whole line on certain terms and should perform

of this contract must be refused to B

[*Blackell v Bates* (1865) 1 R 1 Ch 117 has supplied the facts]

to (h)—

A contracts to pay an annuity to B for the lives of C and D It turns

. . . . .

**Diversity of cases included**—It is rather unfortunate that this section and the illustrations do not more clearly distinguish cases where

there is a contract binding in law and enforceable, only not by specific performance, from those where there is no contract at all. Cases under sub-sections (a), (b), and (g) belong to the former class; cases under sub-sections (c), (d), mostly but—as the illustrations show—not wholly to the latter; cases under (e) and (f) may belong to either, according as the promisor has or not made himself personally liable besides purporting to bind beneficiaries, or a principal, whom he had no authority to bind; (h) was probably intended to apply only to cases of common mistake, or the failure of a fundamental condition, going to the root of the contract, but its terms are wide enough to cover a partial failure of consideration. But perhaps the use of the word ‘contract’ in the enacting part was meant to exclude all cases of wholly void agreements, though it is hard to see how ‘a contract the terms of which the Court cannot find with reasonable certainty’ can escape being an agreement void for uncertainty under s. 29 of the Contract Act.

In clause (d) the word ‘revocable’ is inaccurate; it should rather have been ‘determinable.’ There is no such thing as a revocable contract of any kind. But for the illustration, one would have thought the draftsman had in mind such cases as *Moorhouse v. Colvin* (p), where the alleged promise amounts only to an expression of intention to do or give what the promisor himself thinks proper.

The fixed limit of time laid down by clause (g) does not correspond to any rule or presumption in English law. It should be needless to remark that an agreement which is to be performed within three years, or one, or once for all and immediately, may, nevertheless, on one of the other grounds enumerated, be such as the Court will not order to be specifically performed.

Clause (e) is in truth a particular case under a more general principle which is not explicitly asserted in the Act, but of which the justice and necessity are obvious. The Court cannot order a performance that would be a punishable offence, or contravene any statute or public regulation made by lawful authority, or be wrongful against any third person. The case of A. making incompatible agreements with X. and Y. has been considered at p. 45, above, under s. 6 of the Contract Act. As to unlawful agreements in general, see the commentary on I. C. A., s. 23, pp. 145 *sqq.*, above.

S. R. A  
S 21

Clause (a) Where compensation in money is an adequate relief —  
“An ordinary contract to lend or borrow money, whether on security or otherwise, comes within this category. But supposing money has already been advanced and the borrower refuses to execute a mortgage according to the agreement, the lender would apparently be prejudiced if the loan were to remain without security, and it is difficult to see what difference it would make in this respect whether the entire loan had been advanced or only a portion, if in the latter case the lender has been ready and willing to advance the remaining sum according to the agreement. On the other hand, if the loan was liable to be repaid at once and the borrower is willing to pay it off, there would be no object in decreeing specific performance in such a case” (q) Where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non payment of the balance, he cannot sue for specific performance of the agreement to lend the full sum promised (r). See I C 1, s 39, notes under the head “Disabled himself from performing, p 285, above. An agreement to grant a *karam* in Malabar is not affected by this clause, being in substance not for lending but for a well known kind of tenancy (s).

Clause (b) Contracts involving personal services cannot be specifically enforced (t) see the first three illustrations of cl (b). Similarly no specific performance can be decreed of a contract to give in marriage (u). Contracts by which a party thereto agrees to execute works which the Court cannot superintend cannot be specifically enforced. So it was held where A agreed to sell his property consisting of a building and vacant land to B, and B agreed to build a temple on a portion of the land and to secure an annuity to A and his wife (v). See also notes to s 12, ‘Contracts to execute building or other works,’ p 761, above.

(q) *Uccal Ayyadara v. Itharavani* (1914) 41 Mad 101 at p 97b 43 I C 291. *South African Territories Co. Ltd v. Wallington* [1895] 1 C 309.

(r) *Phil Chinnai v. Chinnai Mal* (1905) 33 All 202, *South African Territories Co. Ltd v. Wallington* [1895] 1 C 309. *Amalram v. S. Tirumala* (1879) 1 Mad 79. *Idigapattinam v. Sreekrishna* (1917) 31 Mad 111 34 4 I C 101. *St. LA Cal v. S. S. S. B. B.* (1911) 43 Cal 71.

29 I C 621.

(s) *Thiruvalluvar Unnirai Kuttis v. Varaman Chelvar*, 123 I C 1. 1 I 1 1029 Mad 77.

(t) *P. M. Charan v. J. A. Lal Das* (1913) 41 Cal 19 33 20 I C 17.

(u) *In the matter of Chappal Varaman* (1878) 1 Cal 74.

(v) *Idigapattinam v. Sreekrishna* (1917) 31 Mad 111 34 4 I C 101. *St. LA Cal v. S. S. S. B. B.* (1911) 43 Cal 71.

**Claus<sup>a</sup> (c)** Where the terms cannot be ascertained with reasonable certainty —Where by the terms of a kabuliat the Government agreed to construct large and small embankments, and to excavate the silt of khals and close the mouths of the khals the Court refused at the suit of the lessee to pass a decree directing the Government to carry out those works (w) The mere difficulty, however, in fixing the terms of a contract, is no ground for refusing specific performance In a case where the contract was that if the lessees wanted more land for the purposes of the lease, the lessors should let such land "at a proper rate," the Judicial Committee of the Privy Council, dissenting from the view taken by the High Court of Calcutta that it was impossible to determine what was a reasonable rate said "Their Lordships cannot think that in the present case the Court, upon a proper inquiry, would have been unable to determine it There might have been considerable difficulty in fixing the rate, but difficulties often occur in determining what is a reasonable price or a reasonable rate or in fixing the amount of damages which a man has sustained under particular circumstances These are difficulties which the Court is bound to overcome" (x) See I C A s 29 p 228 above

**Mutuality**—Specific performance cannot be granted of a contract which can be enforced at the option of only one of the parties In a modern case a contract was entered into by the guardian of a Mahomedan minor for the purchase of immovable property on behalf of the minor The suit was brought to enforce specific performance against the vendor The Judicial Committee held that specific performance could not be decreed of such a contract Their Lordships said They are of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract It is immaterial that the purchase was advantageous for the minor (y)

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(w) *Chunder Sellur v The Collector of Midnapore* (1878) 3 Cal 464 107, 114 5 Cal '32 93  
 (x) *The New Beerbhoom Coal Co, Ltd v Boloram Mahata* (1880) L R 7 I A 1 A 1, 39 Cal 232 13 I C 331  
 (y) *Mir Sarwarjya v Fakrudin Mahomed Chowdhury* (1911) L R 39

S. R. A.  
S. 21.

**Minors and specific performance.**—See notes above under the head “Mutuality,” and notes to s 11 of the I C A under the head “Specific performance,” p 76, above

**Contract to refer to arbitration.**—The last clause of s 28 of the Contract Act is somewhat similar to the last clause of the present section. The former clause has been repealed by the Specific Relief Act except in certain Scheduled Districts where the Specific Relief Act is not in force.

The last clause of the present section does not apply unless (1) there is a contract to refer a controversy to arbitration, and (2) the plaintiff has refused to perform it.

“*Contract to refer a controversy to arbitration*”—The contract the existence of which will bar a suit under the circumstances contemplated by the present clause must be an operative contract and not a contract broken up by the conduct of the parties to it. Thus where nothing was done by either party under the agreement to refer, in one case for more than a year (z), and in another for more than three years (a), it was held that the agreement was no bar to the suit. Upon the same principle, where the plaintiff purports to withdraw from a submission, but no steps are taken by the defendant to enforce the submission by proceedings under the Code of Civil Procedure, it is tantamount to an acquiescence by the defendant in the withdrawal, and the agreement to refer is no bar to the plaintiff's suit (b). Similarly where the arbitrators refused to act and no action was taken by either party for seven years to enforce the agreement, it was held that the agreement was no bar to a suit respecting matters comprised in the agreement (c).

A submission may be revoked for good cause (d). Therefore, where a plaintiff alleges in his plaint that he revoked the submission and states the grounds, it is the duty of the Court to inquire whether the submission was revoked in fact and whether there were good grounds for the

(z) *Tahal v Bisheshar* (1886) 8 All 57

(a) *Atma Das v Sheobaran Das* (1882) 2 All W N 58

(b) *Adhibas v Gursandas* (1886) 11 Bom 199

(c) *Ram Kumar v Jagmohan* (1911)

33 All 315, 9 I C 80

(d) A submission in cases governed by the Arbitration Act, 1890, cannot be revoked except by leave of the Court unless a different intention is expressed therein sec 5 of the Act

revocation The Court should not without such inquiry hold the suit barred under this section (e)

"*Has refused to perform it*"—The mere fact of filing a suit is not tantamount to a refusal to perform the contract within the meaning of this clause, it must be shown that the plaintiff has refused to refer to arbitration (f)

"*Shall bar the suit*" — The wording of this section is wide enough to cover contracts to refer any matter which can legally be referred to arbitration One of such matters is a suit proceeding in Court" (g) Therefore, where the parties to a suit refer the matters in difference between them in such suit to arbitration, *the further hearing* of the suit will be barred under this section (h) See the Code of Civil Procedure 1908 Sch II, para 3 (2)

### (c) *Of the Discretion of the Court*

22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal

The following are cases in which the Court may properly exercise a discretion not to decree specific performance

I Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part

#### *Illustrations*

(a) A a tenant for life of certain property, assigns his interest therein to B C contracts to buy and B contracts to sell that interest Before the contract is completed A receives a mortal injury from the effects of which he dies the day after the contract is executed If B and C were equally ignorant or equally aware of the fact B is entitled to specific per

(e) *Bansidhar v Sital Prasad* (1906) 29 All 13

(f) *Koomud Chunder v Chunder Kant* (1879) 5 Cal 498 *Tahal v Bisheshar* (1885) 8 All 57

(g) *Sheoambar v Deodat* (1887) 9 All 168 170 171

(h) *Sheo Dat v Sheo Shankar* (1900) 27 All 53 *Salig Pam v Jhunna Awar* (1889) 4 All 546

S. R. A.  
S. 22.

formance of the contract If B knew the fact, and C did not, specific performance of the contract should be refused to B

[*Ellard v Lord Llandaff* (1809, Ireland) 1 Ball & Beatty, 241, 12 R R 22, the tenant for life's condition was in fact within the seller's special knowledge which is not noticed in Chitty J's critical remarks in *Furner v Green* [1895] 2 Ch at p 209 *Qu* whether it was not really a case of fraud This illustration, anyhow, adopts *Ellard v Lord Llandaff* to its full extent]

(b) A contracts to sell to B the interest of C in certain stock in trade It is stipulated that the sale shall stand good even though it should turn out that C's interest is worth nothing In fact, the value of C's interest depends on the result of certain partnership accounts, on which he is heavily in debt to his partners This indebtedness is known to A, but not to B Specific performance of the contract should be refused to A

[*Smith v Harrison* (1857) 26 L J Ch 412, 112 R R 412 The sale is voidable]

(c) A contracts to sell, and B contracts to buy, certain land To protect the land from floods it is necessary for its owner to maintain an expensive embankment B does not know of this circumstance, and A conceals it from him Specific performance of the contract should be refused to A

[*Shirley v Stratton* (1780) 1 Bro C C 440 no reasons reported "In distrustful concealment" of course amounts to fraud]

(d) A's property is put to auction B requests C, A's attorney, to bid for him C does this inadvertently and in good faith The persons  
is a mere puffer  
price Specific

[*Additional Illustration* — A sells a leasehold house to B, and in answer to B's inquiry states in good faith, but by inadvertence, that no notice from the landlord has been served or requiring certain dilapidations A's knowledge, affecting the  
is material, and A is not entitled to specific performance, even though in the circumstances B may not be entitled to rescind the contract *Reyfus v Lodge* [1925] Ch 350]

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

#### Illustrations

five years, to sell the land to C Here, the enforcement  
would operate so harshly on A, that the Court will not compel its specific performance in favour of C

in a contract to sell the trust-estate to D, and personally agree to exonerate the estate from heavy incumbrances to which it is subject The purchase money is not

nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

[*Wedgwood v Adams* (1843) 6 Beav 600, 63 R R 195]

(g) A, the owner of an estate, contracts to sell it to B, and stipulates that he, A, shall not be obliged to define its boundary. The estate really comprises a valuable property, not known to either to be part of it. Specific performance of the contract should be refused to B, unless he waives his claim to the unknown property.

[Simplified from *Barendale v Seale* (1854) 19 Beav 601, 105 R R 261]

(h) A contracts with B to sell him certain land, and to make a road to it from a certain railway station. It is found afterwards that A cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

[*Piccock v Penson* (1848) 11 Beav 355, 83 R R 193]

(i) A, a lessee of mines, contracts with B, his lessor, that at any time during the continuance of the lease B may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

[*Talbot v Ford* (1842) 13 Sim 173, 60 R R 314. If the notice had been limited to a prescribed short time before the end of the lease the covenant would be reasonable.]

(j) A contracts to buy certain land from B. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to B.

[*Denne v Light* (1857) 8 D M & G 774, 114 R R 328]

(k) A contracts with B to buy from B's manufactory and not elsewhere all the goods of a certain class used by A in his trade. The Court cannot compel B to supply the goods, but if he does not supply them A may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

[Apparently suggested by *Hills v Croll* (1845) 2 Ph 60, 78 R R 23 where the reason given is that the Court is unable to enforce the whole of the contract but the substantial relief there sought was an injunction, as to which see Fry on Specific Performance § 853. There is no word of any one being ruined in the report.]

The following is a case in which the Court may properly exercise a discretion to decree specific performance —

III Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance

#### Illustration

A sells land to a railway-company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.

[*Storer v G W Ry Co* (1842) 2 Y & C C C 48, 60 R R 23. The only difficulty in the case was the nature of the performance to be enforced.]

S R A.  
S 22

**The discretion of the Court**—The accustomed language of English equity judges as to the discretion of the Court in granting specific performance is intimately bound up with the historical limits of their jurisdiction. Every one who came to a court of equity for relief was bound to show that he had no remedy or no adequate remedy, in the *ordinary jurisdiction of a court of common law*. Failing this his suit would be dismissed 'for want of equity'. Now a claim for specific performance assumes the existence of an actionable contract. Therefore the plaintiff had always to face the question: Why is not the common law right to recover damages good enough for your case? and the Court was in strictness always on the defensive against a charge of trespassing on the domain of the common law. The Court of Chancery did indeed establish the presumption that specific performance was the proper remedy on a contract to convey land, but it was only a presumption liable to be displaced: there is no absolute right to this remedy.

The Court exercises a discretion and directs a specific performance unless it should be what is called highly unreasonable to do so: what incidents or consequences shall be deemed highly unreasonable must depend on the circumstances of the particular case (1).

But in a Court which has jurisdiction to administer all remedies what remains of the Chancery doctrine is that the Court will decree that remedy which appears the more just and equitable, subject to the settled rule (expl. to s. 12 above) that specific performance will only for special reasons be refused on a contract for the conveyance of immovable or granted on a contract for the transfer of movable property. A Court of unlimited jurisdiction cannot of course avoid, as the *English Court of Chancery* often did, deciding whether there is or is not an enforceable contract.

The modern rule has been thus declared: 'It is clear that the Court may exercise a discretion in granting or withholding a decree for specific performance, and in the exercise of that discretion the circumstances of the case and the conduct of the parties and their respective interests under the contract are to be remembered' (2).

Our s. 22 with its subdivisions and illustrations is really more like

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(1) Lord Langdale in *Wheeler v. Wharfedale* 102 L. R. at p. 107.  
*Finch* (1843) 1 K. & J. at p. 603. 61. (2) *Oxford v. Iremonger* (1848) 1 K. & J. at p. 159. approved *Balson v. Iremonger* 1 K. & J. 151.  
*Mason* (18. 3) 4 D. M. & C. at p. 39.

an elementary lecture than legislation. We are far from saying that an exposition of this kind was not required or at least useful in 1877. It must not be supposed to be exhaustive (k)

We have nothing more to add to the identification of the cases that furnished the illustrations except that in some of them the facts as reported have been purposely simplified, others really have much more to do with injunctions than with specific performance, in several the limits of equitable jurisdiction, as they existed in England down to 1875, make it very difficult to say whether the Court really thought there was any contract at all, and Lord Justice Knight Bruce's judgment in *Denne v Light* [clause II, ill (j)], is one of the characteristic utterances which refresh the reader of De Gex Macnaghten and Gordon's reports with a "gladsome light of jurisprudence" undreamt of by Coke.

There are, of course, many agreements not assignable to any particular head of this section which are quite unfit, as a matter of plain common sense, to be specifically enforced. Such was an undertaking by a Hindu, as part of an attempted settlement of a communal controversy, to cut down a pipal tree. Consideration or no consideration, it is hard to see how specific performance could be seriously demanded (l).

**Delay**—Where delay not amounting to a bar by any statute of limitations is pleaded as a defence to a suit for specific performance the validity of that defence must be tried upon principles substantially equitable. "Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy" (m). In *Erlanger v New Sombrero Phosphate Co* (n) Lord Penzance said "Delay, as it seems to be has two aspects. Lapse of time may so change the condition of the thing sold or bring about such

(k) See *Karsondas Kalidas v Chhotalal Motichand* (1923) 48 Bom 259, 77 I C 275, A I R 1924 Bom 119.

(l) *Israr Hasan Khan v Deo Narain* (1929) 115 I C 457, A I R 1929 All 372. Qz whether performance would not have been unlawful as tending to more breach of the peace rather than recon-

ciliation. The judgment is enlivened by a couplet somewhat defaced in the printer's transliteration quoted without reference from the opening of the *Gulistan*.

(m) *Lindsay Petroleum Co v Hurd* (1874) I P 5 P C 221 239.

(n) (1878) 3 App Cas 1218 1231.

S. R. A.  
S. 22.

circumstances, the Court should refuse specific performance (d). It is otherwise, however, where there is no such inequality between the parties (e). The mere fact that the terms of a bargain are onerous will not amount to "unfair advantage" within the first branch of this section in the absence of evidence of fraud or misrepresentation (f). But we shall find under s. 28 that the present section does not exhaust the subject. Authorities on s. 12 of the Contract Act obviously may be applicable here (g).

**Case II. : Hardship on the defendant.**—"The question of the hardship of a contract is generally to be judged of *at the time at which it is entered into* ; if it be then fair and just and not productive of hardship, it will be immaterial that it may be by the force of subsequent circumstances or change of events have become less beneficial to one party except where these subsequent events have been in some way due to the party who seeks performance of the contract" (h).

"This clause clearly contemplates a case in which the vendor has entered into a contract without full knowledge of the circumstances. Instances of cases may be found in the books, where it has been held that mere improvidence or inadequacy is no hardship within the meaning of the rule, but that the bargain must be so hard as to be unconscionable, so that its actual performance would in the circumstances be inequitable. But where the hardship has been brought upon the defendant by himself, the Court will not consider that as a circumstance in favour of the refusal of specific performance" (i).

**"Provision for payment by vendor of a specified sum on breach."**  
The mere fact that a contract for sale of land contains a clause whereby the vendor agrees in case of breach to return the earnest money and to pay also a specified sum as damages does not entitle the purchaser to specific performance (j).

(d) *Callianji v. Narsi* (1895) 19 Bom. 761, 767.

(e) *Shib Lal v. The Collector of Barilly* (1891) 16 All. 423, 433.

(f) *Davis v. Maung Shwe Go* (1911) L. R. 35 I. A. 165; 11 I. C. 801.

(g) *E.g., Ram Sundar Saha v. Raj Kumar Sen Choudhury*, 55 Cal. 285; 104

I. C. 527, A. I. R. 1927 Cal. 889.

(h) *Fry*, § 418; (1891) 16 All. 423, 435, *supra*.

(i) *Haradhan v. Bhagabati* (1914) 41 Cal. 852, 863; 23 I. C. 214.

(j) *Saliq Hussain v. Anup Singh* (1923)

1 Lah. 327; 70 I. C. 91; A. I. R. 1921 Lah. 151.

(d) *For whom Contracts may be specifically enforced.*

Who may ob-  
tain specific per-  
formance

23. Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

- (a) any party thereto ,
- (b) the representative in interest, or the principal, of any party thereto provided that, where the learning, skill, solvency or any personal quality (A) of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed ,
- (c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ,
- (d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainder man ,
- (e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant ,
- (f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach ,
- (g) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation ,

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(1) See note on s 21 (b), p 75, above

S. R. A.  
S. 23.

(h) when the promoters of a public company have, before its incorporation, entered into a contract, for the purposes of the company, and such contract is warranted by the terms of incorporation, the company.

*Nature of sect 23*—This section is really an enumeration of the kinds of parties, besides the actual contractors, who are entitled to sue on a contract. It involves no principle peculiar to the remedy of specific performance. On one or two points it is more definite than the corresponding English authorities and therefore it seems to us that citation of those authorities would not be useful. We agree with Whitley Stokes that no reason appears why sub sec (c) should not have extended to all compromises of doubtful claims. As to the validity of compromises in general, see under s 25 of the Contract Act, p 192, above. It may be observed by way of caution that the enforcement of restrictive covenants by way of injunction does not come within this section.

**Clause (a) Party to the contract**—Where there is a joint contract all must join in suing on the contract. Specific performance cannot be granted to some only of several purchasers, if others refuse to join in the suit (l)

**Clause (b) Representative in interest**—Where A agreed to grant a lease to B of a property which was at the date of the agreement in the possession of mortgagees and B agreed to undergo all the labour necessary for the conduct of a suit for redemption which was then pending and to pay all the expenses of the litigation, and the rent was to commence from the date on which possession was recovered from the mortgagees it was held that the personal quality of B was a material ingredient in the contract and that his heir was not entitled to specific performance against A (m)

**Clause (h) Contract with promoters of a company**—A contract by a person with the promoters of a company to take a certain number of shares of the company when formed is not a contract for the purposes of the company within the meaning of this clause and

(l) *Safur Pishman v Maharajunnessari* (1903) 71 Cal 262 276. As to personal quality, see also *Pillai v Pillai* (1897) 24 Cal 832. *Krishnamma Hari v Ganapadas* (1887) 14 M.L.J. 29. *Mahar* (1918) 42 Ind 214. A.P. 1918.  
(m) *Mickenden Nath v Kala Prabhu* 46 I.C. 331.

allotment of shares to such a person by the company, if nothing is done by him amounting to an acceptance of the allotment, will not make him a shareholder or entitle the company to sue him for the unpaid calls on those shares (n) The suit, moreover, in such a case is not one for specific performance See s 27, cl (e), as to the company's liability to be sued In England the company's right to sue in such cases is said to be deduced, on the principle of mutuality, from its liability (o)

(e) *For whom Contracts cannot be specifically enforced*

Personal bars to  
the relief

24. Specific performance of a contract cannot be enforced in favour of a person—

- (a) who could not recover compensation for its breach,
- (b) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed (p),
- (c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract, or
- (d) who previously to the contract, had notice that a settlement of the subject matter thereof (though not founded on any valuable consideration) had been made and was then in force

*Illustrations*

to clause (a)—

A, in the character of agent for B enters into an agreement with C to buy C's house A is in reality acting not as agent for B but on his own account A cannot enforce specific performance of this contract

[See I C A s 236 p 738 above]

to clause (b)—

A contracts to sell B a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent A becomes insolvent Neither he nor his assignee can enforce specific performance of the contract

[The insolvency need not have been judicially established but there

(n) *Imperial Ice Manufacturing Co, Ltd v Munchershae* (1889) 13 Bom 415

(o) Fry Sp Perf § 251

(p) Referred to in *Sanwaley Prasad v Sheo Sarup* (1906) 2 Luck 279 93 I C 770, A I R 1927 Oudh 12, but

the case really fell under s 54 of the Contract Act which see above The rights of an aggrieved party under that section are of course, not affected by the present clause

S. R. A.  
S. 24.

must be such proof of general insolvency as the Court can act on. *Veal v Mackenzie* (1837) 1 Keen, 474, 44 E. R. 105.]

A. contracts to sell B. a house and garden in which there are ornamental trees, a material element in the value of the property, as a residence. A., without B.'s consent, fells the trees. A. cannot enforce specific performance of the contract.

A., holding land under a contract with B. for a lease, commits waste, or treats the land in an unhusbandlike manner. A. cannot enforce specific performance of the contract.

A. contracts to let, and B. contracts to take, an unfinished house, B. contracting to finish the house and the lease to contain covenants on the part of A. to keep the house in repair. B. finishes the house in a very defective manner, he cannot enforce the contract specifically, though A. and B. may sue each other for compensation for breach of it.

[*Tildesley v Clarson* (1867) 30 Bear. 419, 132 P. R. 334, no doubtable law, a case purely on facts, one fails to see why it was reported.]

to clause (c)—

A. contracts to let, and B. contracts to take, a house for a specified term at a specified rent. B. refuses to perform the contract. A. thereupon sues for, and obtains, compensation for the breach. A. cannot claim specific performance of the contract (g).

**Matters of defence.**—Note that whereas s. 23 deals with general rules of procedure or title to sue, the sections from 24 to 26 inclusive declare special grounds of defence founded on the plaintiff's conduct.

The conduct of the party applying for relief is always an important element for consideration (r).

If in the illustration to clause (b) as to the ill finished house (c), the lessee had entered and occupied before the lessor's work was done, it would be a question for the Court whether in all the circumstances his occupation implied such acquiescence in the lessor's performance of the contract as to debar him from finally refusing to perform it on his part (t). Such circumstances as continued protest and payment of rent under protest will exclude any presumption of acquiescence.

For an example of the same kind of case being set up without success the lessee having nothing better to show than "querulous letters" not unusual in building contracts see *Oxford v Provard* (u).

Clause (d) is founded on a state of English law which has now been altered by legislation, see under the following section.

(q) In *Whitley Stokes Anglo-Indian* codes a reference is here given by some mistake to a case which has nothing to do with the subject.

(r) *Lawrence v. Durn* (1873) L. R. 8 H. L. 414, 420.

(s) The letters of the law.

and lease have gone wrong in the printed text of the Act the lessor was to find the house and the lessee to keep it in repair during his occupation.

(t) *See* (r).

(u) (1875) L. R. 3 P. C. 155 (1875) L. R. 10 Q. B. 100.

(v) *See* *Whitley Stokes Anglo-Indian* codes.

25. A contract for the sale or letting of property,

Contracts to sell property by one who has no title, or who is a voluntary settler

whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor—

- (a) who, knowing himself not to have any title to the property, has contracted to sell or let the same,
- (b) who, though he entered into the contract believing that he had a good title to the property cannot, at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt,
- (c) who, previous to entering into the contract has made a settlement (though not founded on any valuable consideration) of the subject matter of the contract

*Illustrations*

(a) A without C's authority, contracts to sell to B an estate which A knows to belong to C. A cannot enforce specific performance of this contract, even though C is willing to confirm it.

(b) A bequeaths his land to trustees, declaring that they may sell it with the consent in writing of B. B gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with C to sell him the land. C refuses to carry out the contract. The trustees cannot specifically enforce this contract as, in the absence of B's consent to the particular sale to C, the title which they can give C is as the law stands, not free from reasonable doubt (v).

(c) A, being in possession of certain land, contracts to sell it to Z. On enquiry it turns out that A claims the land as heir of B, who left the country several years before, and is generally believed to be dead but of whose death there is no sufficient proof. A cannot compel Z specifically to perform the contract (w).

(d) A, out of natural love and affection, makes a settlement of certain property on his brothers and their issue and afterwards enters into a contract to sell the property to a stranger. A cannot enforce specific performance of this contract so as to override the settlement and thus prejudice the interests of the persons claiming under it.

**Varieties of bad title.**—The wording of clause (a) is not wholly clear. Knowing oneself not to have any title must be something more than

(r) The present writer knows of no authority for holding such a general consent in advance to be good

(w) Obviously A has not made out his title

S. R. A.  
S. 24.

must be such proof of general insolvency as the  
v. *Mackenzie* (1837) 1 Keen, 474, 44 R. R. 105 ]

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n s s (r)

As to cases where the original acceptance of the contract expressed to be subject to approval of the title on the buyer's part see pp 49, 50, above

"A doubtful title"—Clause (b) follows English law as it was understood when the Act was passed the principle being that it is not reasonable to compel a purchaser to fulfil his contract when the title is open to so much and such plausible objection that, even though on full argument it might turn out to be good, to buy such a title would be to risk buying a lawsuit "The Court will not force a doubtful title on a purchaser" was the common way of stating the rule At this day where a title depends on a really hard question of construction which the Court can determine in another appropriate form of procedure, a suit for specific performance is not the right way to raise it, and the vendor will probably lose his costs even if in one way or another he turns out to be in the right on the point in question (a) But the older general rule has now become the exception "It is the duty of the Court unless in very exceptional circumstances, to decide the rights between the vendor and the purchaser, even though a third person not a party to the action will not be bound by the decision" (b) Indeed a like opinion had been expressed in the Court of Appeal at a much earlier date (c) After all every title produced by a vendor must be good or bad, in the sense that it must satisfy or fail to satisfy the conditions of the vendor's contract (d) Why should the Court decline to make up its mind? There would be no answer to this criticism under a system of officially authenticated title In England however some titles may be and are doubtful to the point of appearing good to some very learned persons and bad to others The prominence of the rule in English doctrine is accounted for partly by this peculiarity of English real property law and partly by the anxiety of Chancery judges down to the middle of the nineteenth century or later not to decide a point of common law if they could help it

There has been considerable discussion as to the kind and amount of objections that will make a title too doubtful to be forced on a

(a) *Nichols and Son v Joel's Contract* [1910] 1 Ch 43 C 1

(b) *Smith v Colbourne* [1914] 2 Ch 533 541, per Lord Cozens Hardy M 1

(c) *Ib*, at pp 544 545

(d) The decree made at the trial of a

specific performance suit is conclusive as to the terms of the contract an averment that the purchaser was aware of a material defect is not admissible in an inquiry as to the following the decree *McIlroy v Alderley Estate Co* [1918] 1 C 503

S. R. A.  
S. 25.

purchaser Obviously no complete definition is possible It might have conduced to clearness if it had always been remembered that, apart from statutory provisions which in England are compulsory only to a very limited extent, and between the extreme cases of practically immemorial continuity in a regular succession and bare faced pretence of ownership by an imposter not having even a possessory title there is no such thing as an absolutely good or bad title A vendor seeking specific performance is bound to prove his title subject to such admissions, waivers of inquiry, and acceptance of less than strict proof as the purchaser has agreed to by the terms of the contract If the proof does not come up to that mark, the title is as between the parties, not doubtful but bad Such is the case, for example when the vendor was formerly a trustee for sale of the property he is now dealing with and bought it for himself and fails to produce any sufficient evidence that he did so with the knowledge and consent of the beneficiaries, and the nature of the case is not altered if the judgment employs old fashioned phrases and says "it would be inequitable to force such a title as this upon" the purchaser (e)

From this point of view there cannot be any large proportion of cases in which the Court is of opinion that the vendor has satisfied the burden of proof and yet thinks that a judicial pronouncement of that opinion would still leave the buyer exposed to such risk of adverse claims or of difficulties if he is hereafter minded to become a seller, as a prudent buyer cannot reasonably be expected to undertake In common practice judicial approval of a title is accepted as sufficient even when the question decided was of admitted difficulty (f) There are exceptional cases however in which the Court may really feel doubtful, a judge of first instance, in presence of unreconciled differences or ambiguities in the dicta of an appellate Court is in that position "The Court must feel such confidence in its own opinion as to be satisfied that another Court would not adopt another conclusion" (g) Therefore the existence of apparently conflicting deci-

(e) *Williams v. Scott* [1900] A C 437  
508

(f) The present writer had occasion to be acquainted (not personally) with a case where a purchaser was advised enough to dispute a decision of Sir C Jessel on which the title rested Clitty

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sion has been regarded as a sufficient ground of doubt even in the Court of Appeal (h) It has happened in the case of a title dependent not on any general principle of law, but on the construction of a particular will, that a very learned judge expressed his own opinion in favour of the title and yet thought the question too doubtful to justify him in decreeing specific performance but eighteen years later another judge, with a contract for sale of property under the very same title before him, agreed with his predecessor's opinion, regretted his decision as over-cautious, and held that there was no sufficient reason for refusing specific performance (i) It is possible that both decided rightly

In modern English practice difference of judicial opinions, or a reasonable apprehension thereof, seems to be the only accepted ground for the kind of doubt now in question (j) Apparently there is nothing to prevent Indian judges from taking the same line

When clause (a) was enacted, a conveyance without valuable consideration was by the law of England voidable at the suit of a supervening purchaser for value even with notice, under a sixteenth century statute as construed by the Courts, but now it cannot be so defeated (k)

Illustrations (b) and (c) are illustrations of clause (b) The following are additional illustrations —

(1) N mortgages his property to V in 1880 N and V sell the property in 1882 to C, but the sale deed is not registered N dies in 1883 leaving a will of which V is the executor In 1885 C sells the property to H V who has not obtained probate of N's will, joins in the sale both in his own right and as executor of N In 1888 H agrees to sell the property to M H cannot specifically enforce this contract, as the sale deed of 1882 not having been registered, the equity of redemption remained in N up to the time of his death On his death it passed to his executor V, but V not having obtained probate of N's will, he could not make a valid transfer of the equity of redemption though he joined in the sale to H N's heir could therefore sue the person in possession for redemption and the title cannot therefore be

(h) *Palmer v Locke* (1881) 18 Ch Div 281

(i) *Pryle v Heughan* (1899) 10 Hare 1 90 I R 243 *Mullins v Trier* (1870) 11 10 F 1 419

(j) See Fry on Specific Performance § 890

(k) Voluntary Conveyances Act 1893 56 & 57 Vict c 21 (see now Law of Property Act 1925 s 172)

S. R. A.  
S. 25.

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(*h*) *Palmer v Locke* (1881) 18 Ch Div 281

(*i*) *Pyrle v Wallingham* (1852) 10 Hare 1, 90 R R 243, *Mullings v Trinder* (1870) L R 10 F 449

(*j*) See Fry on Specific Performance, § 890

(*k*) Voluntary Conveyances Act, 1893, 56 & 57 Vict c. 21 (see now Law of Property Act, 1925, s. 172)

S. R. A.  
S. 27.

- (c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;
- (d) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation;
- (e) when the promoters of a public company have, before its incorporation, entered into a contract, the company: provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.

*Illustrations—*

*to clause (b)—*

A contracts to convey certain land to B by a particular day. A dies *intestate* before that day without having conveyed the land. B may compel A's heir or other representative in interest to perform the contract specifically.

A contracts to sell certain lands to B for Rs 5,000. A afterwards conveys the land for Rs 6,000 to C, who has notice of the original contract.

Assession of the  
Jury of B  
relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C.

[*Daniels v Davidson* (1803) 16 Ves 249, 17 Ves 433, 10 R R 171]

A contracts, in consideration of Rs 1,000, to bequeath certain of his lands to B. Immediately after the contract A dies *intestate*, and C takes out administration to his estate. B may enforce specific performance of the contract against C.

A contracts to sell certain land to B. Before the completion of the contract, A becomes a lunatic and C is appointed his committee. B may specifically enforce the contract against C.

*to clause (c)—*

A, the tenant for life of an estate, with remainder to B, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to C, who has notice of the settlement. Before the sale is completed A dies. C may enforce specific performance of the contract against B.

[*Je Dyles Estate* (1869) L R 7 Eq 337. The point there was that the Court treated the agreement as equivalent to a formal execution of the power.]

A and B are joint tenants of land, his undivided moiety of which either may alien in his lifetime, but which only yet to that right, and values

c. the plaintiff A contracts to sell his property to C and dies. C may enforce specific performance of the contract against B.

[Not the application of this to coparceners in a joint Hindu family, see *Pamappa v. Leappa* (1927) 52 Bom. 707. 109 I. C. 532. A. I. P. 1928 I. 1119. For some peculiar results of successive sales of undivided shares in property *Alulab v. Akmal* 122 I. C. 656. A. I. P. 1929 All. 517. (1.20) A. I. 1. 1119.

**Contents of the section**—Sec. 27 is a counterpart of s. 23, enumerating classes of possible defendants to a specific performance suit who were not original parties to the contract as that section enumerated classes of possible plaintiffs. The rules here given for convenience exhibit no common ground of principle and little, if any, of practice belonging to actions for specific performance more than to other forms of proceeding (r). Clause (c) is so worded as to be barely intelligible without the illustrations. The word 'defendant' at the end stands, in point of sense for some such words as 'original contracting party from whom that title is derived'. The rule is a consequence of the equitable doctrine which regards a purchaser as acquiring as soon as the contract is complete the rights of an owner against the vendor and all persons not being purchasers for value without notice of the contract, and not claiming under an independent title adverse to the vendors. English cases are mostly of little use for illustration, the principle is assumed and the discussion turns on some complication introduced by special circumstances.

Clause (d) appears to ignore the accepted doctrine as to novation, it does not say however that the original debtor company (which may survive a pretty long time for the purpose of winding up) is released without the assent of the creditor which would indeed be a startling new departure.

The liability declared in clause (e) was established in England in the course of the nineteenth century by decisions given in courts of equity "partly on the ground of a distinct obligation having either been imposed on the company in its original constitution or assumed by it after its formation, partly on a ground independent of contract and analogous to estoppel namely that where any person has on certain terms assisted or abstained from hindering the promoters of a company in obtaining the constitution and the powers sought by them, the

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(r) A defendant who has pleaded and conducted his defence on the merits cannot on appeal raise the question whether he was a proper party. *Jagan natha Rao v. Soma Lalshminarajana* (1930) 125 I. C. 549.

S. R. A  
S. 27.

company when constituted must not exercise its powers to the prejudice of that person and in violation of those terms" (s) This doctrine applies only where the company has become expressly bound or has taken the benefit of the terms made with the promoters, the present section says "ratified and"—not or—"adopted the contract", if this were construed to require express ratification the Indian rule would be narrower than the English. It seems to be assumed, however, that the intention was to re-affirm the rule as laid down in England (t) Sir Edward Fry's statement is that "the company itself, after incorporation, must either have taken the benefit of the contract, or have otherwise recognised it as a contract binding on them," and "the contract must be for something warranted by the terms of the incorporation" His own opinion agrees with judicial dicta suggesting that the doctrine has gone quite far enough if not too far (u)

**Indian authorities** Clause (b) **Purchase with notice of prior agreement for sale**—This clause contains provisions similar to those of s. 10 of the Transfer of Property Act and s. 91 of the Indian Trusts Act. See notes to s. 3 above under the head "III (g)".

In the case put in the second illustration to cl. (b), B's right to enforce specific performance of his contract as against C will not be affected although the sale deed to C may have been registered and although he has obtained possession under his purchase (v)

The principle upon which the third illustration to cl. (b) proceeds is that "the occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights and if he chooses to make no inquiry of the tenant, he cannot claim to be a transferee without notice" (w) But occupation of property which has not come to the knowledge of the party charged is not constructive notice of any interest in the property (x)

(s) Pollock on Contract, p. 217 9th ed.  
(t) See also dictum in *Imperial Ice Manufacturers Co. v. Muncaster & Co.* (1880) 13 Bom. 415 423.

(u) Fry on Sp. Perf. §§ 250-251.

(v) *Chintre Kant Jij v. Keshu & Sauter* (1884) 10 Cal. 710. *Krishnan & Krishnan* (1890) 13 Mal. 324. *Namini v. Vellayudhan* (1895) 18 Mal. 17. *H. v. S. & J. v. H.* (1900) 23

Cal. 468. *Hirallal v. Vasudev* (1912) 36 Bom. 446 450-451. 11 I. C. 680. *Nanbat Jai v. Dhaunkal Singh* (1910) 38 All. 184. 32 I. C. 903. *Fili Ibrahim v. Fili Gulzari* (1911) 45 Bom. 910. 60 I. C. 986.

(w) *Bhirona Iij v. Mathab Chavtra* (1913) 40 Cal. 200. 19 I. C. 9.

(x) *Manji v. Hordas* (1911) 35 Bom. 317 318-319. 31 I. C. 2.

It has been held by the High Court of Calcutta that mere registration of the original contract for sale is not sufficient notice of a contract within the meaning of this clause (y) It would, it seems, be held the same way in Madras (z), but differently in Bombay (a) and Allahabad (b)

Where a person claims to be a transferee for value without notice of the original contract, the burden lies upon him to prove that he fulfils that character (c) And in this connection it must be noted that notice before actual payment of the whole of the purchase money, even although it may have been secured, or before the conveyance is actually executed, is binding in the same manner as notice had before the contract (d)

A contracts to sell certain land to B for Rs 5,000 A afterwards conveys the land for Rs 6,000 to C, who has notice of the original contract, and puts C in possession of the land B, not knowing of the transfer to C, sues A and obtains a decree for specific performance against him This does not bar a suit by B against C for specific performance and for possession (e)

Cl (b) applies not only to sales, but to leases (f)

**27A.** Subject to the provisions of this Chapter where a contract to lease immoveable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,—

Specific performance in case of part performance of contract to lease

(y) *Preonath v Ashutosh* (1900) 27 Cal 358

(z) See *Shan Maun Mull v Madras Building Co* (1892) 15 Mad 268

(a) See *Lakshmandas v Dasrat* (1882) 6 Bom 168

(b) See *Janki Prasad v Kishen Dat* (1894) 16 All 478

(c) *Himalal v Vasudev* (1912) 36 Bom 446, 16 I C 680, *Baburam Bag v Maikhab Chandra* (1913) 40 Cal 563 569, 19 I C 9, *Hem Chandra De Sarkar v Amiyabala De Sarkar*, 52 Cal 121, 84 I C 693, A I R 1925 Cal 61, *Pamdens Singh v Guman Lal*, 119 I C 70, A I R 1919 Pat 300

*Mohan Lal v Wadhawan Singh* (1930) 123 I C 86 *Mohammad Sadik Khan v Masihan Bibi* (1930) 9 Pat 417 125 I C 158

(d) *Himalal v Vasudev* (1912) 36 Bom 446 451 16 I C 680

(e) *Gaffur v Bhikaji* (1907) 26 Bom 159

(f) *Baburam Bag v Maikhab Chandra* (1913) 40 Cal 563 See also *Kameswaramma v Sutaravji* (1906) 29 Mad 177 [mortgage] and cp as to notice of restrictive agreements *Maung Pu Lwin v Maung Sein Hau*, 7 Pang 100, 116 I C 478 A I R 1927 Pang 93

S R. A  
S. 27a.

- (a) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract, and
- (b) where specific performance is claimed by the lessee, he has in part performance of the contract, taken possession of the property, or, being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof

This section applies to contracts to lease executed after the first day of April, 1930

[Added by Act XXI of 1929, s 3 ]

This new section has to be read along with a section added to the Transfer of Property Act by s 16 of the same Act, as follows

[53A. Where any person contracts to transfer for consideration any  
Part performance      immovable property by writing signed by him or on  
his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty

and the transferee has in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract

and the transferee has performed or is willing to perform his part of the contract,

then notwithstanding that the contract though required to be registered has not been registered, or, where there is an instrument of transfer that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession other than a right expressly provided by the terms of the contract

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof]

By these enactments the English equitable doctrine of part performance is adapted to Indian conditions, but with so much alteration and restriction that English authority will be of little use in construing either of them. The curious reader may find the English rule expounded, with discussion of the judicial explanations given at various times, in a judgment delivered by the present Lord Justice Romer as a judge of first instance (g). But any attempt to strain the words of the Indian Acts by invoking the analogy of English decisions on a much wider unwritten rule is pretty sure to be defeated. We purposely say nothing of the English decisions.

Before the enactment of s. 27A it was held that an agreement for a lease which creates a present demise and which requires registration under the Registration Act, cannot be specifically enforced even if it is accompanied or followed by possession in part performance of the agreement (gg). Under s. 27A a suit will lie for specific performance even if the agreement is not registered if the conditions laid down in the section are complied with.

(h) *Against whom Contracts cannot be specifically enforced*

## 28. Specific performance of a contract

What parties cannot be compelled to perform cannot be enforced against a party thereto in any of the following cases —

- (a) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff (h),

(g) *Rawlinson v Ames* [1914] 1 Ch 96 105. Note that here similar facts would not satisfy the conditions of s. 27A.

(gg) *Sanjib Chandra v Santosh* (1921) 49 Cal 507, 69 I C 877, A I R 1922 Cal 436.

(h) Fixing of price by a valuer under the contract does not preclude the Court from inquiring whether the consideration

is adequate and criticising the valuer's estimate. *Misa Lal v Khairat Lal* (1923) 46 All 211, 78 I C 1037. If the validity of the contract is disputed the Court must of course decide upon it see *Debi Dajal v Ghasita* 119 I C 836, A I R 1929 All 667, (1929) All L J 125, where the objections appear to have been frivolous.

S. R. A.  
Ss. 28 30.

Finally, this section appears to overlap to an undefined extent the provisions of heads (I) and (II) of s 22. One is tempted to wonder whether it was not an afterthought interpolated by some hand foreign to the original design. We must be content that it is not known to have done any harm.

**Inadequacy of consideration**—The rule observed in England until the passing of Stat 31 Vic, c 4, not to decree specific performance of an agreement to sell a reversionary interest when the purchase money was less than the market value of the reversion, is not the rule in India. “No mention of it is to be found in the Specific Relief Act, and, if it had been intended to give effect to it, we should have expected to find it in section 28 of the Act” (h).

(i) *The effect of dismissing a Suit for Specific Performance*

29. The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.

Bar of suit for  
breach after dis-  
missal

**Compensation**—Where specific performance or injunction is refused on the ground that damages are the proper remedy, the Court should itself award damages, though no damages be asked for in the plaint. “In England, no doubt, a bill in equity would have been dismissed, but then the plaintiff would have his suit at law for damages. Here, however, a new suit would not lie, and consequently when the plaintiff is held entitled to a remedy, the appropriate remedy should be awarded” (i). As to the power of the Court to award compensation, see s 19 above.

(j) *Awards and Directions to execute Settlements.*

Application of  
preceding sections  
to awards and tes-  
tamentary direc-  
tions to execute  
settlements

30. The provisions of this Chapter as to contracts shall, *mutatis mutandis*, apply to awards and to directions in a will or codicil to execute a particular settlement.

(i) *Gilalai v Palsay* (1892) 17 Bom  
232

(i) *Callanji v Narsi* (1893) 19 Bom  
761 “70

**Awards and testamentary directions to execute settlements** — This is according to English practice as long settled. Inasmuch as the duty of performing an award arises from the contract of the parties to submit the difference to arbitration, there is no reason why the matter of an award should not be a fit subject for a decree of specific performance, provided that a direct agreement to the same effect would have been so. The award must of course be conformable to the arbitrator's authority. Testamentary directions to execute a settlement operate in English law by way of creating a trust and are not considered under the head of specific performance, though the Court does, in the course of administering estates and otherwise, direct them to be specifically carried out. But in one sense all equitable jurisdiction rests on the power of issuing specific orders.

**Limitation** — There is a conflict of opinion whether a suit to enforce the terms of an award is a suit for specific performance governed by art. 113 of the Limitation Act which provides a period of 3 years, or is governed by the residuary article 120 which provides a period of 6 years. On the one hand it has been said that by reason of the operation of the present section, a suit for the specific performance of the terms of an award should be regarded as a suit for the specific performance of a contract. On the other hand the opinion has been expressed that all that the present section lays down is that when the question is one of specific performance, the Court has the same powers and should proceed upon the same principles in the case of an award as in the case of a contract (*m*) and a suit to enforce the award will not be a suit for specific performance of a contract unless such is the express purport of the award. Even in that case it might well be held that what the Court enforces is still the award, not the contract on which the original claim was founded, nor yet the contract of submission to arbitration. The latter view, it is submitted, is correct. It is in accordance with the practice observed by the Court of Chancery in England in decreeing specific performance of awards. The jurisdiction of the Court in these cases, not being any jurisdiction peculiar to awards, but its ordinary jurisdiction applicable to agreements, many, if not all, of the principles applicable to ordinary cases or suits for the specific performance of

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(*m*) See the cases collected in *Auld* p. 111 I. C. 700. See also *Furlong v Dube* & *Mahaul Dube* (1910) 34 All. 43. *Jam. v. J.* (1904) 28 Bom. 1.

S. R. A.  
S. 30,  
Ch III.

agreements applied to the specific performance of awards (n) This jurisdiction was founded on the principle that "when parties have agreed to submit their differences to the determination of a third person and to abide by any orders or regulations which he may make, his decision and the regulations and orders which he may prescribe, constitute the agreement of the parties, and it is for the purpose of enforcing that agreement that this Court interferes to enforce and give effect to the award" (o) As to the form of a suit on an award, see the Code of Civil Procedure, Sch I, App A form No 10

## CHAPTER III

### OF THE RECTIFICATION OF INSTRUMENTS

**Rectification Introductory**—Sees 31 32 33 were providently copied from arts 1899–1901 of the draft Civil Code of New York and are a fair sample of the loose thinking and bad workmanship which pervade that unhappy experiment "Mutual mistake for 'common'" in s 31 is bad English (though rather frequent in modern reports and text books) and the mixing up of fraudulent interpolation or alteration with failure to carry out instructions in proper form whether by incompetence by innocent misunderstanding, or by mere accidental error, is inelegant and but for sound English tradition being already established, might easily have led to inconvenient consequences

The principles on which the Courts act in England are in themselves quite simple the difficulties when they occur, are of evidence or construction In a proper case the Court will amend the language of an instrument for the purpose of making it accord with the true intention of the parties having ascertained what that intention was and also that the words as they stand fail to express it Rectification cannot be adjudged unless the Court is satisfied on both these points 'There can be no rectification where there is not a prior actual contract by which to rectify the written document' (p)

There is no need, it should be observed to invoke this jurisdiction in case of such verbal slips or omissions as are obvious on the face of the

(n) *Nichols v Hancock* (1855) 12 D. L. J. 101 (o) *Nichols v Hancock* last note 12 D. L. J. 307 (p) 100 L. R. 13 per Turner J  
 (p) *Edwards v Carter* 11 L. R. 101

writing and can be corrected by the context alone. The remedy of these minor blunders is within the Court's ordinary function of construing the expressions used. Even a missing clause can be supplied in an instrument of a well known form if the sense clearly requires it (q).

Where the instrument finally executed is in conformity with a previous written agreement of the parties, but there was error in the expression of that agreement, it is now settled in England that they can both be rectified in the same suit (r). The earlier doctrine that the final instrument cannot be rectified alone is therefore reduced to a warning against careless pleading, the reason for it is that the real error was in the preliminary agreement.

As there must be clear and satisfactory proof both of the real common intention and the departure from it in the document which the plaintiff seeks to rectify (s), it has been the usage of English courts of equity not to grant rectification of a written instrument on oral evidence alone when the alleged mistake is positively denied by the defendant. On the whole this appears to be a habit of judicial prudence rather than a positive rule of evidence (t).

It is a sufficient reason for rectifying an instrument that it is so unskilfully framed as to raise a serious doubt whether it expresses the true intention. The Court being satisfied that the expression as it stands is obscure and may be misleading may proceed to reform it so as to make it plain without undertaking to decide how it would be construed if the question of rectification were not raised (u).

In most cases of rectification the proximate origin of the mistake lies in the carelessness or want of skill of the draftsman employed, but if exceptionally one of the parties by negligence or to conceal some fact he does not wish to disclose (not to speak of downright fraud) has caused the instrument to be so framed as to defeat the intention known to himself, of the other party or parties, the party so in fault

(q) See e.g. *Pedfern v Bryning* (1877) 6 Ch D 133. *Burchell v Clark* (1876) 2 C P Div 88 (reference to counterpart).

(r) *Craddock v Hunt* [1913] 2 Ch 136. C.A. approved by the Judicial Committee in *United States v Motor Trucks* [1924] A.C. 196.

(s) *Fowler v Fowler* (1859) 4 De C & J 200. 194 R.R. 234.

(t) Authorities collected in Pollock on Contract 9th ed. 507.

(u) *Waller v Armstrong* (1806) 8 D.M. & G. 531. 114 R.P. 234 a case of gross professional incompetence on the draftsman's part. The judgment of Knight Bruce L.J. is no less amusing than instructive. Followed *Walton's Settlement* [1911] 2 Ch. 509.

S. R. A.  
Ch. III.,  
S. 31.

cannot be heard to say that his own intention was different. Cases of this kind are likely to be on the verge of fraud or undue influence (v)

As to s. 32 we must confess that we do not understand what meaning the framers of the New York draft Civil Code attached to it or on what authority they supposed it to be founded. If they meant only that the agreement according to which an instrument is to be rectified must be a lawful and valid agreement, such as the Court would enforce if directly sued upon, it was idle to lay down that truism in vague and pompous language, if not, they failed to express with any certainty what more they did mean.

Sec. 33 is unnecessary in any jurisdiction where the Court is free to exercise common sense, but there is no harm in it.

**31. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified, and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.**

#### Illustrations

(a) A intending to sell to B his house and one of three godowns adjacent to it executes a conveyance prepared by B in which through B's fraud, all three godowns are included. Of the two godowns which were fraudulently included B gives one to C and lets the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C but it cannot be rectified so as to affect D's lease.

(b) By a marriage settlement A, the father of B, the intended wife, covenants with C, the intended husband to pay to C his executors administrators and assigns, during A's life, an annuity of Rs 5000. C dies intestate and the official assignee claims the annuity from A. The Court, on finding

(v) *Loosey v. Smith* (1880) 15 Ch. D. 655, *Whiteley v. McGregor* [1913] A. C. 132, 144, 150 where the H. L. applied and perhaps extended the doctrine in peculiar circumstances. see I. Q. I. xxx. 135

We may have gone beyond the text of the authorities in definitely stating the rule as formulated on estoppel, which we think the best explanation.

it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity

[The material question is what the parties intended to express in the settlement, not what they 'always intended']

**Rectification** —To establish a right to rectification of a document it is necessary to show that there has been either fraud or common mistake (*w*); and rectification will not be granted unless it is distinctly claimed (*x*) This does not affect the jurisdiction of the Court to correct manifest or undisputed errors without any formal rectification (*y*) The mistake of one party to a contract is not a ground for rectification (*z*) Oral evidence is admissible to prove either fraud or mistake (*a*) Under the terms of the section it is necessary that the Court should find it clearly proved that there was fraud or common mistake. This requirement has, of course, been long established by English decisions (*b*) See notes "Rectification Introductory," on pp 824-826, above

**"Mutual" mistake** —The mistake referred to in this section is in the expression of a contract, not in its formation "The Court in administering equitable principles permit *mistake* to be proved where it is common that is, where the expression of the contract is contrary to the concurrent intention of all the parties If such mistake be established, then the Court can give the relief of rectification, but be it noted,

(*w*) *Amanat Bibi v Luchman Pershad* (1887) L R 14 I A 18 14 Cal 308 (elementary law in England)

(*x*) *Blay v Pollard* [1930] 1 K B 628

(*y*) In *Ladha Singh v Munshiram Agarwalla* 31 C W N 747 104 I C 509 A I R 1927 Cal 605 an undefended suit, the plaintiff sued on a promissory note in the defendant's handwriting, wherein the rate of interest was expressed to be one per cent per annum, by inadvertence for one per cent per mensem as the plaintiff alleged and the Court believed, he claimed interest at the higher rate, but did not pray for rectification Costello J with much doubt whether the defendant had made an honest mistake at all, and some doubt whether the

suit ought not to have been under the present section gave judgment for the plaintiff for the full amount clearly a just decision even if a point was strained to reach it *Quære* was it not open to the Court to take judicial notice of the current rate of interest and treat the error as manifest?

(*z*) *Haji Abdul Rahman v The Bombay and Persia Steam Navigation Co* (1892) 16 Bom 561

(*a*) Evidence Act 1872 s 9<sup>o</sup> proviso (1) See *Maung Pe Gyi v Hakim Ally* (1923) 2 Ran 113 80 I C 759, A I R 1924 Ran 235 (filling up an amount left blank)

(*b*) *Madhavji v Ramnath* (1906) 30 Bom 457, 464

S. R. A.  
S. 31.

(as therein error often lurks) that what is rectified is not the agreement, but the mistaken expression of it. Ordinarily this mistaken expression would be in the form of a document, and the existence of a real agreement prior to the document is necessarily implied. The rectification consists in bringing the document into conformity with this prior agreement, and without such agreement there can be no rectification. It is an adjustment of the machinery to its proper end" (c). But if the common mistake is in the formation of a contract, both the parties being under a mistake as to a matter of fact essential to the contract the case is not one for rectification (d), though it may be one for cancellation; the reason is that in such a case there is no contract at all. "Courts of equity do not rectify contracts. They may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified and that such contract is inaccurately represented in the instrument" (e). See pp. 824-826, above.

**Counterclaim for rectification.**—Though this and the subsequent sections of this chapter refer only to suits for rectification, a defendant may, it is conceived, counterclaim for rectification where the rules by which the Court is governed permit of such a counterclaim. Where the rules of a Court do not permit it, as in the case of Mufassal Courts, those Courts as Courts guided by the principles of justice, equity and good conscience can give effect as a plea to those facts which in a suit brought for that purpose would entitle a plaintiff to rectification. It has been so held by the High Court of Bombay (f). The Calcutta High Court has held differently. According to the latter Court, a document, though it does not by fraud or mistake truly express the intention of the parties, is binding on the defendant until he gets it rectified by a suit brought for that purpose, and he cannot set up those facts as a defence to the suit (g). This view of the law, it is submitted, is not correct.

(c) *Daglu v. Bhana* (1901) 28 Bom. 420, 425-426, per Jenkins C.J.

(d) See Contract Act, s. 20, p. 174, above

(e) *Haji Abdul Rahuman v. The Bombay & Persia Steam Navigation Co.* (1892) 16 Bom. 561, 565-566, per Farran J. All

this, again, has long been elementary in English courts.

(f) *Daglu v. Bhana* (1901) 28 Bom. 420, 426.

(g) *Anarullah v. Koylash* (1842) 6 Cal 118.

Rights acquired by third persons in good faith — In ill (a) the transfer to C is not “for value,” and the conveyance may therefore be rectified as regards the godown transferred to him, though he had no knowledge of B’s fraud. The transfer to D, however, is for value, and he having no knowledge of the fraud, the conveyance cannot be rectified so as to affect his lease. The following is an additional illustration —

A mortgages certain land to B. In the mortgage bond survey No 49-D is inserted by common mistake for survey No 49-A. Subsequently A mortgages survey No 49-A to C, who had knowledge of the mistake. B’s mortgage bond may be rectified by substituting survey No 49-A for survey No 49-D. C, having knowledge of the mistake, cannot be said to have acquired his rights “in good faith” (h).

32. For the purpose of rectifying a contract in writing, the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

See p 826 above

33. In rectifying a written instrument the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

See p 826, above

34. A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the Court thinks fit, specifically enforced.

*Illustration*

A contracts in writing to pay to B a fixed sum in lieu of costs. The contract contains mistakes as to the name and initials of the client which if construed strictly would exclude B from all rights under it. B is entitled if the Court thinks fit to have it rectified and to an order for payment of the sum as if at the time of its execution it had expressed the intention of the parties.

S. R. A. or lessor the rents and profits, if any, received by him as  
S. 35. such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

*Illustrations—*

*to (a)—*

A sells a field to B. There is a right of way over the field of which A. has direct personal knowledge but which he conceals from B. B is entitled to have the contract rescinded.

*to (b)—*

A, an attorney, induces his client, B, a Hindu widow, to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled to have the instrument of transfer rescinded.

[This is a matter of conveyance, but it presupposes or includes a contract.]

**Rescission.**—See notes, "Judicial rescission Introductory," pp 830, 831, above.

"Any person interested in a contract."—The remedy by way of rescission is not confined to persons named as parties to a contract (m); it is open to any person, who, though not named as a party to a contract, is interested in the contract. Thus any member of a joint Hindu family is entitled to rescind a contract entered into by the manager, whereby the former would be defrauded (n).

**Clause (a) Variable contract.**—This clause, it is conceived, comprises cases referred to in ss 19, 19A, 39, 53 and 55 of the Indian Contract Act. It also, it is submitted, includes cases where a power to rescind is reserved by the contract to one or both of the contracting parties.

**Clause (b) In pari delicto**—The provisions of this clause do not

(m) It is available for legal representatives and other assigns, provided that the original party has not by his own conduct disentitled himself to relief, which does not affect the general rule. See *Shrinani Gopal Mahapatra v Kashiram Dey*, 51 Bm. 137, 29 B. L. R. 115, 100 I. C. 912, A. I. R. 1927 Bm. 384.

(n) *I N. v. Gangadhar Das* (1880) 4 Bom. 29. In this case the manager, while ostensibly selling the right to cut wood in a forest belonging to the family for Rs. 4000 made a collateral private bargain according to which he was to receive Rs. 4000 more.

apply if the parties are *in pari delicto* (o) See notes to ss 23 and 65 of the Indian Contract Act

**Lapse of time and limitation**—See notes under the same head to s 16 of the Indian Contract Act, pp 113, 114, above

**Last paragraph**—The words “in the same case” in the last paragraph refer to the case mentioned in cl (c) Under this paragraph the court has the power to make an order on a motion in the suit in which the decree for specific performance was passed to rescind the contract instead of relegating the opponent to another suit for rescission (p)

**36. Rescission of a contract in writing (q) cannot be**  
Rescission for mistake
adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made

See notes on pp 830, 831, above

**37. A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled, and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly**  
Alternative prayer for rescission in suit for specific performance

This section is almost verbally identical with the opening of § 1058 on Fry on Specific Performance

**38. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require**  
Court may require party rescinding to do equity

See I C A ss 11, 64 65 pp 65 365 368 above

(o) *Hari v Varo* (1894) 18 Bom 31  
 (p) *Kurpal Hemraj v Shamrao Raghu*  
*nath* (1903) 47 Bom 589 72 I C 321  
 A I R 1903 Bom 211

(q) The words in writing are repealed w<sup>l</sup> rever the Transfer of Property Act 1882 is in force

S. R. A.  
S. 39.

## CHAPTER V.

## OF THE CANCELLATION OF INSTRUMENTS.

39. Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled (r).

When cancellation may be ordered.

If the instrument has been registered under the Indian Registration Act (s), the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

*Illustrations.*

(a) A, the owner of a ship, by fraudulently representing her to be seaworthy, induces B, an underwriter, to insure her. B may obtain the cancellation of the policy.

(b) A conveys land to B, who bequeaths it to C and dies. Thereupon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.

(c) A, representing that the tenants on his land were all at will, sells it to B, and conveys it to him by an instrument, dated the 1st January, 1877. Soon after that day, A fraudulently grants to C a lease of part of the lands, dated the 1st October, 1876, and procures the lease to be registered, under the Indian Registration Act. B may obtain the cancellation of this lease.

(d) A agrees to sell and deliver a ship to B, to be paid for by B's acceptances of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by A on B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the bills. B may obtain the cancellation of all the bills.

(*Anglo Danubian Co v Rogerson* (1867) L. R. 4 V. 3. The disputed point for which the case is reported was on a question of procedure which is now obsolete in England and could never arise in India.)

(r) According to the terms of the section an express prayer for cancellation would seem to be superfluous, but it is doubtful whether its presence or absence does not, for the purpose of Court fees, make the difference of the suit being for consequential relief or merely declaratory, see *Parvathai v. Krishnakrishna Gounder* (1901) 29 Bom. 297, 6 B. L. R. 1125.

*Kulur Saran v. Raghubar*, 5 Luck. 235, 121 I. C. 291. A. I. R. 1921 Oudh 491. On principle, it is submitted, the Court has full discretion to order cancellation whether the plaintiff expressly asks for it or not, and therefore the suit is in no case merely declaratory.

(s) See now Act XVI of 1908.

When cancellation may be ordered.—To entitle a plaintiff to a decree for cancellation of an instrument, three points must be made good by him, namely,—

- (1) that the instrument is void or voidable ;
- (2) that the plaintiff has reasonable apprehension that the instrument, if left outstanding, may cause him serious injury ; and
- (3) that the Court ought under the circumstances of the case, in the exercise of its discretion, to order it to be delivered up and cancelled. Delay in the institution of the suit or the plaintiff's conduct may be such that the Court may in the exercise of its discretion refuse to grant him relief. The appellate Court will not lightly interfere with an exercise by the first Court of its discretion. But if there is no exercise of discretion at all by the lower Court in decreeing cancellation of an instrument, the appellate Court may set aside the decree (t)

In the exercise of this discretion, the Court should ordinarily, where a plaintiff is out of possession and is in a position to claim a decree for possession, refuse to pass a decree for the cancellation of an instrument according to which, if genuine, he has no title to the land, and leave the plaintiff to a suit for possession (u)

Any person against whom an instrument is void or voidable.—The relief by way of cancellation of an instrument may be claimed not only by a party to the instrument, but by any person against whom the instrument is void or voidable. Thus a creditor may sue on behalf of himself and all other creditors to set aside a deed executed by his debtor by which the creditors are defrauded, defeated or delayed within the meaning of s 53 of the Transfer of Property Act (v). A perfected conveyance is of course not void or voidable merely because the consideration has not been paid (w)

Reasonable apprehension of serious injury.—It cannot be laid down as a rule of law that in no case a man, who has parted with his property,

(t) *Fulley Mahomed v Dattabhoj* (1901) 25 Bom 10, 18-19, 24 [suit for cancellation of an award].

(u) *Shankar Lal v Sarup Lal* (1912) 34 All 140, 142, 13 I C 19

(v) *Ishwar v Dewar* (1903) 27 Bom 146

(w) *Abdul Hashim Sahib v Kadir Batcher Sahib* (1919) 42 Mad 20, 48 I C 370

S. R. A.  
S. 39.

## CHAPTER V.

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If the instrument has been registered under the Indian Registration Act (s), the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

#### *Illustrations*

(a) A, the owner of a ship by fraudulently representing her to be seaworthy, induces B an underwriter, to insure her B may obtain the cancellation of the policy

(b) A conveys land to B, who bequeaths it to C and dies Then upon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him C may obtain the cancellation of the forged instrument

(c) A representing that the tenants on his land were all at will sells it to B, and conveys it to him by an instrument dated the 1st January 1877 Soon after that day, A fraudulently grants to C a lease of part of the land dated the 1st October, 1876, and procures the lease to be registered under the Indian Registration Act B may obtain the cancellation of this lease

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[*Anglo Danubian Co v Iorgerson* (1867) L R 4 Eq 7 The disputed point for which the case is reported was on a question of procedure which is now obsolete in England and could never arise in India]

(r) According to the terms of the section an express prayer for cancellation would seem to be superfluous, but it is doubtful whether its presence or absence does not, for the purpose of Court fees, make the difference of the suit being for consequential relief or merely declaratory, see *Purandhar v Ishwar's Ginech* (1901) 29 Bom 207, 6 B L R 1125.

*Kulter Swan v Ishwar* 5 Luck 235, 121 I C 281, A I R 1923 Outh 491 On principle it is submitted the Court has full discretion to order cancellation whether the plaintiff expressly asks for it or not and therefore the suit is in no case merely declaratory

(s) See now Act XVI of 1908

When cancellation may be ordered —To entitle a plaintiff to a decree for cancellation of an instrument, three points must be made good by him, namely,—

- (1) that the instrument is void or voidable ,
- (2) that the plaintiff has reasonable apprehension that the instrument, if left outstanding, may cause him serious injury ; and
- (3) that the Court ought under the circumstances of the case, in the exercise of its discretion, to order it to be delivered up and cancelled Delay in the institution of the suit or the plaintiff's conduct may be such that the Court may in the exercise of its discretion refuse to grant him relief The appellate Court will not lightly interfere with an exercise by the first Court of its discretion But if there is no exercise of discretion at all by the lower Court in decreeing cancellation of an instrument, the appellate Court may set aside the decree (t)

In the exercise of this discretion, the Court should ordinarily, where a plaintiff is out of possession and is in a position to claim a decree for possession, refuse to pass a decree for the cancellation of an instrument according to which, if genuine, he has no title to the land, and leave the plaintiff to a suit for possession (u)

Any person against whom an instrument is void or voidable —The relief by way of cancellation of an instrument may be claimed not only by a party to the instrument but by any person against whom the instrument is void or voidable Thus a creditor may sue on behalf of himself and all other creditors to set aside a deed executed by his debtor by which the creditors are defrauded, defeated or delayed within the meaning of s 53 of the Transfer of Property Act (v) A perfected conveyance is of course not void or voidable merely because the consideration has not been paid (w)

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S R A  
S 39.

in respect of which a void or voidable instrument exists can sue to have that instrument cancelled. The test is, "reasonable apprehension of serious injury." Whether that exists or not, must depend on the circumstances of the particular case with which the Court has to deal. Thus where the swami of a math who had become old and blind executed a *jummapatra* whereby he appointed the defendant manager of the properties of the math upon certain terms, and delivered possession of some of the math properties to the defendant, and the swami subsequently sold the math properties to another person, and thereafter brought a suit against the defendant for cancellation of the *jummapatra* alleging that the defendant had failed to comply with the terms of the instrument, it was held by the High Court of Bombay that though the swami had sold the math properties and had no longer any interest in them, he was entitled to maintain the suit the grounds of the decision being that if the document were not cancelled the purchaser (who, it may be observed was joined as a plaintiff) might sue the swami for a return of his purchase money if the swami could not give possession of the lands by reason of the defendant holding them under the *jummapatra* and that there was danger also of the defendant suing the swami in respect of the lands of which the defendant had not obtained possession (x). In an earlier Madras case, however where the plaintiff, who had sold and delivered possession of her property to the buyer (her nephew) sued the defendant for cancellation of the sale deed alleging that the defendant had forged it in the name of the plaintiff's executant and that if the instrument was left outstanding she might be sued by the buyer on the covenants relating to the property, it was held that the plaintiff was not entitled to a decree for cancellation. The Court said: "Clearly she had no legal interest in the property comprised in the sale deed but it is suggested that she is entitled to have that instrument cancelled in case any action for damages should be brought against her on the covenant contained in the document executed in her nephew's favour. We are of opinion that this bare possibility does not entitle a plaintiff who has divested herself of all interest in the property to maintain this suit" (y). This view of the law it is submitted, is not correct. We are inclined to think that apprehension of a party being sued on covenants in a conveyance apparently binding is a reason

(x) *Adra's apprais v. Chandraappan* (1872) 3 L. R. 37. (y) *Jyoti v. Jami ul-Mamuna* (1871) 13 M. L. 619.

able apprehension of serious injury within the meaning of this section, and, other conditions being present, he is entitled to a decree for cancellation (z) It is different, however, where the defendant has already sued and obtained a decree against the buyer on the alleged forged instrument, and the plaintiff subsequently sues the defendant not only for cancellation of the instrument but to set aside the decree The plaintiff, not being a party to the decree, is not entitled to have it set aside unless the buyer is joined as a party to the suit (a)

Where A sues B on a bond which B alleges is void *e g*, as being passed for a balance due on wagering transactions, and pending the suit B sues A for cancellation of the bond B is not entitled to cancellation It cannot be said in such a case that B would suffer serious injury if he did not bring the suit, for the very plea which is the foundation of B's suit is his defence in A's suit (b) Moreover, the question of the validity of the bond being before the Court in A's suit, it cannot be said thus far that it would be left "outstanding" within the meaning of this section But where A sues B for possession of certain land under s 9 of the Act, and pending the suit he sues B for cancellation of a deed of gift under which B claims title to the land, there is nothing to prevent the Court from decreeing A's second suit, for the question in the second suit is one of title, while there is no such question in the first suit, the only question in the first suit being whether A was dispossessed otherwise than in due course of law (c)

**Registration**—The proceedings of a Registrar under the Registration Act are of an executive officer invested with *quasi* judicial functions and not proceedings of a judicial character An order, therefore, made by the Registrar for the registration of a document of which the execution is denied by the party alleged to have executed it is no bar to a suit by such party for cancellation of the document under this section That this is so is clear from the provisions of the second paragraph of this section (d)

**Limitation**—Where a document is voidable (as distinguished from void), so that possession of the property to which it relates could not

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(z) See also (1899) 23 Bom 375 at Bom 607  
 p 380 last page (c) *Jai Gopal v Lalit Mohan* (1904) 26  
 (a) *Jhuna v Bens Pam* (1887) 9 All All 236 See notes to s 9 above  
 439 (d) *Mohima Chunder v Jugul Kishore*  
 (b) *Chhaganlal v Dhondu* (1903) 27 (1881) 7 Cal 736

S. R. A.  
Ss. 39, 40.

be recovered until the document is set aside, and the suit is for cancellation of the document and for possession, the period of limitation is 3 years as provided by art 91 of the Limitation Act, art 144 which provides a period of 12 years does not apply to such a case (e) Art 91 does not apply where the document is void from its very inception, the reason is that a document which is void *ab initio* does not require to be set aside (f) See also notes to s 16 of the Contract Act under the head "Lapse of time and limitation," pp 113, 114, above

40. Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue

What instru-  
ments may be par-  
tially cancelled

#### Illustration

A draws a bill on B, who endorses it to C by whom it appears to be endorsed to D, who endorses it to E C's endorsement is forged C is entitled to have such endorsement cancelled leaving the bill to stand in other respects

**Partial cancellation.**—This section should not be applied unless the rights or obligations evidenced by an instrument are distinct and separable The following are further illustrations —

(1) In 1871 A agrees to grow indigo for B on 20½ bighas of land for a period of 9 years at the rate of Rs 2 per bigha per annum Of these, 16½ bighas are situated in village R and are held by A under a sub lease from X, Y being the superior landlord and the remaining 4 bighas are situated in village K and belong to A K fails to pay the rent to Y, and in 1874 Y resumes possession of the land The contract becoming impossible of performance (see Contract Act, s 56), A may obtain cancellation of the agreement as regards the 16½ bighas situated in village R *Inder Pershad v Campbell* (g)

(2) A executes a deed of mortgage in favour of B A gets back the deed from B by fraud, and endorses on it a receipt for Rs 1 200 purporting to be signed by B B's signature is forged B is entitled

(e) *Rani Janaki Kunwar v Raja Aji Singh* (1887) L R 14 I A 148, 15 Cal 58, *Bakratram v Khareetji* (1903) 27 Bom 560, *Gorindasami v Ramasawm* (1909) 32 Mad 72

(f) *Unni v Kunchi Imma* (1891) 14

Mad 26, *Jagardao v Phuljhar* (1908) 30 All 375 *Banku Behari v Aristo Gobindo* (1903) 30 Cal 433 See also *Raikeskhor v Debendranath* (1888) L R 15 I A 38 49-50 15 Cal 409, 421

(g) (1891) 7 Cal 474

to have the endorsement cancelled leaving the deed to stand in other respects *Ram Chandar v Ganga Saran* (h)

**41.** On adjudging the cancellation of an instrument (i), the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require

Power to require party for whom instrument is cancelled to make compensation

**Compensation**—Compensation includes, of course, return of any payment received as part of the transaction annulled or avoided (j)

**Compensation on cancellation**—Where a deed of hypothecation or a deed of sale is ordered to be set aside on the ground of collusion between the grantor's manager and the lender, it being proved that the grantor was of weak intellect and that in some cases the money was paid to the grantor and sometimes to his manager the condition of cancelling the deeds should be, not the repayment of moneys proved to have been received by the manager, but of sums shown to have been actually paid to the grantor personally, or borrowed by the manager in the course of prudent management of the estate (k) Where a person advances a small sum of money to another and obtains from the latter by fraud in repayment of the loan a deed of sale of property worth considerably more than the amount of the loan, all that he is entitled to on cancellation of the deed is to be placed in the same position in which he would have been, had he obtained a deed of mortgage instead of a deed of sale He is not entitled to any allowance for repairs and improvements made by him to the property the deed of sale having been obtained by fraud (l)

**Minors**—See notes to s 11 of the Contract Act under the head "Fraudulent representation" p 69 above (m)

(h) (1917) 30 All 103 37 I C 89

(i) This section cannot be extended by analogy to cases where there is no question of cancelling any instrument *Khan Gul v Lakha Singh* 9 Lah 701 111 I C 175, A I R 1908 Lah 609 *Gulabchand v Chunnisal*, 122 I C 266 A I R 1909 Nag 156

(j) See *Guthrie v Abool Mo offer* (1871) 14 Moo I A 53 65 The Court refused to deal under this section with an instru-

ment which was void in the absence of any claim for its cancellation *Ful Bibi v Kholai Mondal* (1927) 55 Cal 712 111 I C 349 *Qu* whether any general rule can be founded on this

(k) *Aj Singh v Bijai Bahadur Singh* (1884) L R 11 I A 211 11 Cal 61

(l) *Sadashiv v Dhakubai* (1881) 5 Bom 450

(m) *Limbaji v Pahi* (1925) 49 Bom 576 88 I C 643 A I R 1925 Bom

S. R. A.  
S. 42.

- (2) Decrees merely declaratory are an innovation, and they first obtained authoritative sanction in England by s 50 of the Chancery Procedure Act of 1852 (15 & 16 Vict, c 86) (1)
- (3) Seven years later, India followed suit with s 15 of the Code of Civil Procedure, 1859, by which it was enacted as follows —

"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for civil courts to make binding declarations of right without granting consequential relief" (10)

- (4) S 15 of the Procedure Code of 1859 was in the same terms as s 50 of the Chancery Procedure Act. As to the latter section, it was held by the Courts in England that it gave a right of obtaining a declaration of title only in those cases where the Court could have granted relief if relief had been prayed for (x). The same interpretation was put by the Judicial Committee of the Privy Council on s 15 of the Procedure Code. In *Kathama Natchiar v Dorasinga* (y), their Lordships of the Privy Council after observing that the application of s 15 of the Procedure Code must be governed by the same principles as those upon which the Court of Chancery proceeds in reference to the Chancery Procedure Act s 50 said as to s 15 of the Code "It appears therefore, to their Lordships that the construction which must be put upon the clause in question is that a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court or in certain cases some other Court" (z).

- (5) The Code of 1859 was repealed by the Code of 1877, and the provision as to declaratory decrees transferred to s 42 of the Specific Relief Act which was passed in the same year

(v) *Deolals Koer v Kedar Nath* (1912) 39 Cal 704 708 15 I C 427

(w) The decisions on this enactment are reviewed in *Kathama Natchiar v Dorasinga* (1875) L R 2 I A 163, 187-190

(x) *Looke v Lord Kensington* (1856) 2 K & J 753, *Lady Langdale v Briggs*

(1856) 8 De C M & G 391

(y) (1875) L R 2 I A 163, 187

*Ailmony Singh v Kallu Ch ren* (1875) L R 2 I A 83 14 Beng I R 75

(z) *F g a Revenue Court Salut Ali Khan v Abdul Gunnee* (1873) I R I A (Suppl) 165 171 11 Beng I R 203 226-227

(6) "The terms of the section [s. 42] are not a precise reproduction of the provision contained in the Act of 1859 and the English law : in one direction they are more comprehensive, in another more limited. It is common tradition that the section was designed to be a substantial reproduction of the Scotch action of *declarator*, but whether this is so or not is of no great moment. We have to be guided by its provisions as they are expressed " (a).

(7) Before the Specific Relief Act the Courts in India had no power to make a merely declaratory decree independently of s. 15 of the Code of Civil Procedure, 1859 : the power to make such decrees rested entirely upon that section (b). It might have been thought that since the enactment of s. 42 of the Specific Relief Act the power of the Courts in India to make a decree merely declaratory rested entirely upon s. 42, and that the Courts had no power to make such a decree independently of that section, but a different view has been taken in some cases which are considered below (p. 845) under the head "Whether a decree merely declaratory can be made independently of this section."

**Scope of the section.**—In a suit under this section—

- (1) the plaintiff must be a person entitled to any legal character (c) or to any right as to any property ;
- (2) the defendant must be a person denying, or interested to deny, the plaintiff's title to such character or right ;
- (3) the declaration sued for must be a declaration that the plaintiff is entitled to a legal character or to a right to property ; and
- (4) where the plaintiff is able to seek further relief than a mere declaration of title, he must seek such relief.

(a) *Deokali Koer v. Kedar Nath* (1912) 39 Cal. 704, 709; 15 I. C. 427.

(b) (1875) L. R. 2 I. A. 169, 179-180, note (y), above.

(c) *Qu.* has a shareholder in a company a "legal character" enabling him to claim a declaration that the acting directors have ceased to be directors? *Kailash Chandra Dutt v. Jogesh Chandra*

*Majumdar*, 32 C. W. N. 1084; 116 I. C. 724; A. I. R. 1928 Cal. 868, where the Court held the applicant wrong on the merits. Ought he not also to have sought further relief? The mere fact of kindred or affinity to a given person is not a legal character: *Farman Ali v. Mohammad Nawaz Khan* (1930) 121 I. C. 417.

S. R. A.  
S. 42.

If any of the first three conditions is not fulfilled, the suit should be dismissed. If those conditions are fulfilled, but the fourth is not, the Court shall not make the declaration sued for.

In *Deokali Koer v Kedar Nath* (d), Sir Lawrence Jenkins said "The section does not sanction every form of declaration, but only a declaration that the plaintiff is 'entitled to any legal character or to any right as to any property' (e) it is the disregard of this that accounts for the multiform and, at times, eccentric declarations which find a place in Indian plaints (f). If the Courts were astute—as I think they should be—to see that the plaint presented conformed to the terms of section 42, the difficulties that are to be found in this class of cases would no longer arise." In the same case the learned Judge said "It is a common fashion to attempt an evasion of Court fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful it cannot be touched, but the device does not merit encouragement or favour" (g). In certain cases such as the government of a company under the Indian Companies Act, it may have to be considered whether the jurisdiction of the Court is excluded or limited by special legislation (h).

**Whether a decree merely declaratory can be made independently of this section.**—In *Kathama Natchiar v Dorasinga* (i), which was a case under s. 15 of the Code of Civil Procedure, 1859, the Judicial Committee held that the Courts in India had no power to make a merely declaratory decree otherwise than under that section. In delivering the judgment of their Lordships of the Privy Council Sir James Colville

(d) (1912) 39 Cal 704, 709, 15 I C 427

(e) Declarations of the right to conduct religious processions and the like have been granted without reference to the Act. *Man-ur Hasan v Muhammad Zaman* (1924) L R 52 I A 61, 86 I C 236, A I R 1923 P C 36, folld, *Mulammad Salim v Ramkumar Singh*, 26 All L J 1001, 110 I C 657, A I R 1923 All 710 (Moslem sacrifice of cows not being in public view) in S C (parties reversed) leave to appeal not allowed 123 I C 333, A I R 1923 All 339, (1929) All I R 241. In the P C case

there was a prayer for an injunction. But the similar case of *Naubahar Singh v Qadir Bux*, 125 I C 14, (1930) All L J 875, was decided expressly under the present section.

(f) For a bad recent specimen, see *Sailendra Nath Bose v Charu Chandra Bannerji*, 118 I C 341, A I R 1923 Cal 422.

(g) (1912) 39 Cal 707-708.

(h) *Sarat Chandra Chakravarti v Tarak Chandra Chatterjee*, 51 Cal 916, 82 I C 405, A I R 1924 Cal 982.

(i) (1875) L R 2 I A 169, 179 180

said "They (their Lordships) at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon the 15th section of the Code of Civil Procedure, the effect of which has been so much discussed. Mr Doyne, however, raised some question as to that, and suggested that the power was possessed by the Courts in the mofussil before the Code of Procedure was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited, and their Lordships conceive that if the Legislature had intended to continue to those Courts the general power of making declarations (if they ever possessed such a power), it would not have introduced this clause into the Code of Civil Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable, the words of the section being 'No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.' Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that clause. The same reasoning applies with equal force to cases arising after the passing of the Specific Relief Act, that is to say, the power of Courts to make a decree merely declaratory since the passing of the Specific Relief Act rests entirely upon s. 12 of the Act, and the Courts have no power to make such a decree independently of that section. But according to the High Court of Madras a suit for a declaration of right may not be within the purview of s. 12 and yet may be maintainable. It has thus been held that a pleader debarred from practising in village Courts by an order of the Collector purporting to have been made under the Madras Village Courts Act on the ground of misconduct may sue for a declaration that the order is void. The suit was against the Secretary of State for India in Council and the Court held that the Collector had no power to make any such order under the said Act and it made the declaration (j). Rance was placed by the High Court upon *Fischer v. Secretary of State for India* (k) in which Lord Macnaghten in delivering the judgment of their Lord

(j) *Pama Laldas v. The Secretary of State for India* (1916) 33 Mad 803, 311 C 310. See also *Imakrishna v. Narayana* (1916) 33 Mad 803, 311 C 310. (k) (1893) 20 I A 16, 27 Q.B. 221, 223.

S. R. A.  
S. 42.

ships of the Privy Council said. "Now, in the first place it is at least open to doubt whether the present suit is within the purview of s 42 of the Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of s 50 of the Chancery Procedure Act of 1852 (15 & 16 Vict, c 86) as interpreted by judicial decisions. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect. This is not the sort of declaratory decree which the framers of the Act had in their mind. But even assuming that the Specific Relief Act applies to such a suit as this, what is the result? If the so called cancellation is pronounced void the order of Government falls to the ground, and the decision of the Collector stands good and operative as from the date on which it was made. Their Lordships are of opinion that the Government have been wrong throughout, and that the suit is properly framed and not open to objection under the Specific Relief Act." There was no point raised in the above case that s 42 did not apply, on the other hand, it was assumed by counsel that s 42 applied, but that there was no "further relief" claimed as required by s 42. At all events, the ground of the decision was that the suit was in fact not for a declaration without more.

On the other hand, in *Sheoparsan Singh v Ramnandan Singh* (l) Sir Lawrence Jenkins, in delivering the judgment of the Judicial Committee, said "The Court's power to make a declaration without more is derived from s 42 of the Specific Relief Act, and regard must therefore be had to its precise terms" (m). Already in 1910 the High Court of Bombay had said "It has long been established that the general power vested in the Courts in India under the Civil Procedure Code to entertain all suits of a civil nature excepting suits of which the cognizance is barred by any enactment for the time being in force does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute" (n).

(l) (1910) L R 43 I A 91 97, 43 Cal 694, 33 I C 914.      Nath (1912) 33 Cal 701 709, 15 I C 427.  
(n) *Vaktula v Agarwala* (1910) 31 Bom 676 680, 7 I C 915.  
(m) See also *Droah, Koer v Acliar*

The above cases are in the Mufassal. Whatever doubt there may be as to the power of the High Court (o) to make a merely declaratory decree independently of s. 42 the Courts in the Mufassal had no such power at any time. The correct view, it is submitted, is that s. 42 is exhaustive of the cases in which a decree merely declaratory can be made, and that the Courts have no power to make such a decree independently of that section. At all events the proviso to s. 42 is paramount and its effect cannot be avoided (p).

**Discretion of the Court** —‘ It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for. There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation (q). It has accordingly been held that a decree should not be passed—

- (1) in a suit by a Hindu widow against her mother in law and a son adopted by the latter for a declaration that the adoption is invalid and that a will made by the mother in law bequeathing the whole of her husband's property to the adopted son is invalid for the purpose of transferring the estate (r).

(o) The Code of 1859 was originally intended for application in the Courts not established by Royal Charter and it was not till the year 1867 (when Supreme Courts were abolished and High Courts established) that it was extended to the Courts in the Presidency Towns (see cl. 37 of the Letters Patent).

(p) *U Po Thein v O A O K P M Firm* 5 Pan 699 106 I C 365 A I P 1978 Ran 34. *Therar v Samban* 6 Ran 183 110 I C 595 A I P 1978 Rang 143. Cp *Pajji Uda raj Singh v Secy of State* 46 All 503 85 I C 212 A I R 1974 All 657 where the main point was that the matter was of exclusive revenue jurisdiction. As to the somewhat complicated relation of this enactment to O XXI r 63 of the

Civil Procedure Code see *Tulsi Das v Shiv Dal* 9 Lah 167 103 I C 763 A I R 197 Lah 631.

(q) *Varan Mitter v Kishen Soondory Das* (1873) L R I A (Suppl.) 149 167 11 Beng L P 171 190. *Ka hama Vatchiar v Dorasinga* (1850) L R 2 I A 169 181 187. *Sheoparsan Singh v Pannandan Singh* (1916) L P 43 I A 91 9 43 Cal 694 704-05 33 I C 914. *Joseph v Calcutta Corporation* (1916) 43 I A 243 748 44 Cal 87 36 I C 912. *Ma Htay v U Tha Hline* 2 Ran 649 88 I C 66 A I P 1950 Rang 184 (plaintiff's conduct was fraudulent, but it seems his claim was wrong on all points).

(r) *Pani Pirthi Pal Kunwar v Pani Guman Kunwar* (1900) L P 17 I A 107 17 Cal 933.

S. R. A.  
S. 42.

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(l) (1916) L J, 43 I A 91 97 43 Cal Nath (1911) 33 Cal 701 708 17 I C 47  
691, 33 I C 914 (n) *Lakshmi v Agarwal* (1910) 31

(m) See also *Deolali Koer v Acler* Bom 676 680, 7 I C. 915

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(q) *Narain Muller v Kishen Soondory Dassee* (1873) L R I A (Suppl) 149 16 11 Beng L R 171 190 *Kathama Vatchar v Dorasinga* (1875) L R 2 I A 169 181 187 *Sheoparsan Singh v Ram nandan Singh* (1916) L R 43 I A 91 97 43 Cal 694 '04-'05 33 I C 914 *Joseph v Calcutta Corporation* (1916) 43 I A 243 248 44 Cal 87 36 I C 912 *Ma Hta j v U Tha Hl ne* 2 Rang 649 88 I C 66 A I R 1908 Rang 184 (plaintiff's conduct was fraudulent but it seems his claim was wrong on all points)

(r) *Rani Parthi Pal Kunwar v Rani Guman Kunwar* (1890) L R 17 I A 107 17 Cal 933

S. R. A.  
S. 42.

- (2) in a suit by a reversionary heir against a Hindu widow and a devisee under her will, for a declaration that the will is invalid for the purpose of transferring the estate (s),
- (3) for a declaration that the election of the defendant as a member of the Bengal Legislative Council is invalid (t),
- (4) in a suit by a purchaser of a reversionary interest against the trustees of a deed of settlement and the beneficiaries, for a declaration of his rights under the deed, when the circumstances are such that to give a declaratory decree would be to offer direct encouragement to speculative purchasers of doubtful titles (u),
- (5) where the case is of such a character that the decree, if passed, might be immediately rendered nugatory by an action of the defendant within the scope of his authority (v),
- (6) where there was an alleged wrong entry (without contest at the time) made many years earlier in the *khewat*, there had been long delay on the plaintiff's part, and the declaration prayed for would not have bound all parties interested (w)

The Privy Council is reluctant to overrule the discretion of the lower Courts in granting a declaratory decree under this section (x)

**A suit does not lie merely to set aside an assertion**—Thus a plaintiff who is actually in receipt of rents from the defendants, his tenants, cannot sue to set aside a mere allegation of the defendants that they were holding the land under a certain tenure (y). But it is otherwise where the tenants not only set up a certain tenure, but exercise rights in the land inconsistent with the tenure under which the plaintiff alleges they hold the land, though consistent with the tenure set up by them (z). Note that in all (g) there is no mere allegation of ownership, but a demand for possession

(s) *Thakurain Jaipal Kumkar v Bhauya Inlar Baladur Singh* (1904) L R 31 I A 67, 26 All 238. *Vijayaram v Sasivarma* (1905) 28 Mad 690 502, *Deoki v Jwala Prasad*, 50 All 678, 113 I C 737, A I R 1928 All 216 does not seem consistent with these authorities which were not cited

(t) *Bhupendra Nath v Ranju Singh* (1914) 41 Cal 381, 20 I C 676

(u) *Bhujendro Bhushin v Trigmanath*

(1881) 8 Cal 761

(v) *Maharaj Narain v Shashi* (1915) 37 All 313, 29 I C 53

(w) *Aftab Ali Khan v Allar Ali Khan*, All L J (1929) 794, 121 I C 209

(x) (1904) L R 31 I A 67, 26 All 238 note (s) *supra*

(y) *Nilmony Singh v Kallu Churn* (1875) L R 2 I A 83, 14 Beng L R 382

(z) *Kali Kishen v Golam Ali* (1880) 13 Cal 9 11

“Person entitled to any legal character or to any right as to any property.”—No suit is maintainable under this section unless the plaintiff is a person entitled to some legal character or to some right as to property, and the declaration sought is that he is entitled to such character or to such right (a) The Court will not make such a merely negative declaration as that A does not infringe Z's trade mark by selling goods under a mark X to which A makes no exclusive claim (b) The right of the owner of a building to receive compensation from a public body for the removal of fixtures attached to the building is a right to property, and he may sue for a declaration of such right (c) A person entitled to property on the death of a Hindu widow may sue, where the parties are referred by a Revenue Court to a Civil Court, for a declaration that the widow is in possession of the property not as heir of a separated Hindu, but as the widow of a deceased coparcener in lieu of maintenance (d) A landlord who is in possession through his tenants may sue the defendant who claims the land as against him by an adverse title and has turned out the tenants for a declaration of his title as against the defendant and for possession which would be by receipt of rents from the tenants It is a mistake to suppose that the tenants are the only persons entitled to sue in such a case (e) A person holding a *zur i peshgi* lease from an occupancy tenant and who has let out the land to others may sue the lessor and the sub lessees for a declaration of his title as *zur i peshgi* lessee and for possession which could only be by receipt of rents from the sub lessees (f) An owner of land has a right to bring a suit against any member of the public who formally claims to use the land as a public road (g) The right of a *gor* (priest) to conduct his *yajmans* (patrons) to a temple to perform worship there on their behalf and receive presents from their patrons is a right to property, and the *gor* may sue for a declaration of such

(a) *Sheoparsan Singh v Rumanandan Singh* (1916) L R 43 I A 91 97 43 Cal 604 33 I C 914 *Deokali Koer v Kedar Nath* (1912) 39 Cal 704, 15 I C 427

(b) *Mohammed Abdul Kader v Finlay Fleming & Co* (1928) 6 Rang 291 111 I C 135

(c) *Joseph v Calcutta Corporation* (1916) L R 43 I A 243 44 Cal 87, 36 I C 912

(d) *Ram Manorath Singh v Dhraya*

(1914) 36 All 106 23 I C 202 *Kanhai Lal v Jai Lal* (1922) 45 All 164, 69 I C 840 A I R 1923 All 54

(e) *Bissesuri v Baroda Kan a Poy* (1884) 10 Cal 1076

(f) *Sa-Pam v Pam Lal* (1896) 18 All 440 [F R] *Ghulam Husain v Mahamud Husain* (1909) 31 All 271

(g) *Chuni Lal v Pam Krishen Sohu* (1888) 15 Cal 460 [F R]

S R A.  
S. 42.

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(a) *Sheoparsan Singh v Ramanandan Singh* (1910) L R 43 I A 91 97 43 Cal 694 33 I C 914 *Deokali Koer v Kedar Nath* (1912) 79 Cal 704 15 I C 42

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(f) *S. J. Pam v Fira Lal* (1870) 18 All 410 [F B] *Ghulam Hussain v Maham mad Hussain* (1907) 31 All 271

(g) *Chun Lai v Fira Kader Singh* (1888) 17 Cal 407 [F B]

S. R. A.  
S. 42.

rights where those rights are interfered with (h) The founder of a *wagf* is entitled, after the death of the *mutaullis* named by him without having exercised the power of appointment conferred on them, to apply for a declaration that the right to appoint successors has devolved on himself (i) A plaintiff may under this section sue for a declaration that the defendant is not his son (j) or that the defendant is not his adopted son (k) A plaintiff in possession of property claiming to be the owner thereof may sue for a declaration that a decree obtained by one of the two defendants against the other affecting the plaintiff's property was collusive and is not binding on the plaintiff (l) A suit may be brought under this section by the Mahomedan inhabitants of a village for a declaration that an *udgh* and the land adjoining it situated in the village is *wakf* property (m)

A suit does not lie under this section for a declaration that a valid personal contract still subsists between the plaintiff and the defendant. Such a suit is not for a declaration that the plaintiff is entitled to a legal character or to any right as to any property (n) Likewise a decree holder cannot sue for a declaration of the debtor's title to property (o)

The right to use a street as a thoroughfare is a right which a Court might properly declare, but the right to pass along a street playing music is not a right which the Courts ought to recognise in that sense (p)

A, a Hindu, dies leaving a widow, B R, A's executor applies for

(h) *Kalidas v Parjaram* (1891) 15 Bom 309 See also *Bani Madho Pragnal v Hiru Lal* (1921) 43 All 20 59 I C 873, but otherwise if the presents are not connected with a religious office *Bansi v Kankaya* (1921) 43 All 159, 59 I C 659  
(i) *Rugghan Prasad v Dianno* 49 All 435 99 I C 1045, A I R 1927 All 257

(j) *Vaktuba v Agarsingji* (1910) 34 Bom 676, 7 I C 945

(k) *Chinnasami v Ambalaianna* (1906) 29 Mad 18

(l) *Gandla v Sitanappa* (1915) 38 Mad 1162, 26 I C 232 But see *Ganga Ghulam v Tapeswari Prasad* (1905) 26 All 606 607, and *Kunhamel v Katti* (1931) 14 Mad 167

(m) *Mulla and Ali v Ibrahim Hussain*

(1910) 32 All 631 But see *Wajid Ali Shah v Duanat ul Lah Beg* (1886) 8 All 31

(n) *Ramlkrishna v Narayana* (1916) 39 Mad 80, 26 I C 893 A declaration that the plaintiff was a holder for value of a cheque was allowed in peculiar circumstances in *Girdhars Lal v Pula niappa Mulali*, 119 I C 153, A I R 1929 Mad 572 *sed qu*

(o) An *Assemble* not even if the property has been attached *A P M A Firm v Maung Po Thein* 4 Rang 22, 95 I C 98 A I R 1916 Rang 121

(p) *Venkatesh v Abdul Kadir* (1918) 42 Bom 438 46 I C 740 Authority on the matter of processions and the like is in a regretfully unsettled state of waste (c) 1 814 above

probate of A's will. S files a caveat, but the caveat is dismissed, and an order is made for a grant of probate to R. Subsequently S sues R and the widow for a declaration that he is the next reversioner to the estate of A and, as such, is entitled to apply to the Court having probate jurisdiction for revocation of the grant of probate. S is not entitled to sue under this section, as he is not entitled to any legal character or to any right to property. The reason is that even as a reversioner he cannot have any right to A's estate *unless A died intestate*, and the grant of probate (*until revoked*) is conclusive that A did not die intestate (q). We purposely refrain from citing other cases where the only matter really in dispute was the special custom of some tribe or sect.

**Declaration as to right to possession** — Ills (a) and (g) show that a person in possession may sue for a declaration in certain events. Where a person is in possession of land, and the defendant, alleging that the land is *wakf* property and that he is the *mutawalli* thereof interferes with his tenants and prevents them from paying rents to him, and it is found that the defendant is not the *mutawalli* nor possessed of any interest in the land, such person is entitled to a declaration as against the defendant that he is *lawfully entitled to possession* and to an injunction restraining him from interfering with his possession. It is not necessary for him to be entitled to such a declaration to negative that the land was *wakf* property. It was so held by the Judicial Committee in *Ismail Ariff v. Mahomed Glouse* (r). 'The possession of the plaintiff [which was for a period of 6 years] was sufficient evidence of title as owner as against the defendant. By sec 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law he could by a suit instituted within six months from the date of the dispossession have recovered possession notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title it is certainly right and just that he should be able against a person who has no title and is a mere wrongdoer to obtain a declaration

(q) *Sheoparsan Singh v Pamanandan Singh* (1916) L R 43 I A 91 43 Cal 694 33 I C 914

(r) (1893) 20 I A 99 20 Cal 834  
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S. R. A.  
S. 42.

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The right to use a street as a thoroughfare is a right which a Court might properly declare, but the right to pass along a street playing music is not a right which the Courts ought to recognise in that sense (*p*)

A, a Hindu, dies leaving a widow, B R, A's executor, applies for

(*h*) *Kalidas v Parjaram* (1891) 15 Bom 309 See also *Beni Madho Pragwal v Hira Lal* (1921) 43 All 20, 59 I C 873, but otherwise if the presents are not connected with a religious office *Bansi v Kanhaiya* (1921) 43 All 159, 59 I C 659

(*i*) *Rugghan Prasad v Dhanoo* 49 All 435, 99 I C 1045, A I R 1927 All 257

(*j*) *Vakulba v Agarsingji* (1910) 34 Bom 676, 7 I C 945

(*k*) *Chinnasami v Ambalathanna* (1906) 29 Mad 48

(*l*) *Gandla v Sivanappa* (1915) 38 Mad 1162, 26 I C 272 But see *Garga Ghulam v Tapesari Prasad* (1904) 26 All 606 607, and *Kunhamed v Kutti* (1891) 14 Mad 187

(*vi*) *Muhammad Alari v Akbar Hussain*

(1910) 32 All 631 But see *Hajid Ali Shah v Dianat ul Lah Beg* (1886) 8 All 31

(*n*) *Ramkrishna v Narayana* (1916) 39 Mad 80, 26 I C 883 A declaration that the plaintiff was a holder for value of a cheque was allowed in peculiar circumstances in *Qurdhari Lal v Pala niappa Mudali* 119 I C 159, A I R 1920 Mad 572 *sed qu*

(*o*) And *semble*, not even if the property has been attached *A R M A Firm v Maung Po Thein*, 4 Rang 22, 95 I C 98, A I R 1926 Rang 124

(*p*) *Venkatesh v Abdul Kadir* (1918) 42 Bom 438, 48 I C 740 Authority on the matter of processions and the like is in a regrettably unsettled state, *cp* note (c) p 844, above

probate of A's will S files a caveat, but the caveat is dismissed, and an order is made for a grant of probate to R. Subsequently S sues R and the widow for a declaration that he is the next reversioner to the estate of A and, as such, is entitled to apply to the Court having probate jurisdiction for revocation of the grant of probate. S is not entitled to sue under this section, as he is not entitled to any legal character or to any right to property. The reason is that even as a reversioner he cannot have any right to A's estate *unless A died intestate*, and the grant of probate (*until revoked*) is conclusive that A did not die intestate (q). We purposely refrain from citing other cases where the only matter really in dispute was the special custom of some tribe or sect.

**Declaration as to right to possession** — Ills (a) and (g) show that a person in possession may sue for a declaration in certain events. Where a person is in possession of land, and the defendant, alleging that the land is *wakf* property and that he is the *mutawalli* thereof, interferes with his tenants and prevents them from paying rents to him, and it is found that the defendant is not the *mutawalli* nor possessed of any interest in the land, such person is entitled to a declaration as against the defendant that he is *lawfully entitled to possession* and to an injunction restraining him from interfering with his possession. It is not necessary for him to be entitled to such a declaration to negative that the land was *wakf* property. It was so held by the Judicial Committee in *Ismail Ariff v Mahomed Ghouse* (r). "The possession of the plaintiff [which was for a period of 6 years] was sufficient evidence of title as owner as against the defendant. By sec 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer to obtain a declaration

(q) *Sheoparsan Singh v Pamanandan Singh* (1916) L. R. 43 I A 91, 43 Cal 694 33 I C 914

(r) (1891) 20 I A 99, 20 Cal 834, *Gangaram v The Secretary of State for*

*India* (1896) 20 Bom 798, *Hanmantrav v The Secretary of State for India* (1901) 23 Bom 287, *Ayyapparaju v The Secretary of State for India* (1914) 37 Ma 1 298, 300, 20 I C 894

**S. R. A. S. 42.** of title as owner, and an injunction to restrain the wrongdoer from interfering with his possession ”

“ **Interested to deny.** ”—A suit may be brought under this section not only against a person denying, but a person interested to deny, the plaintiff's right to property

Where an order is made by a magistrate under the provisions of the Criminal Procedure Code against a person directing him to remove an *otta* standing in front of his shop as an obstruction to the public way, such person may institute a suit against the Secretary of State for India in Council for a declaration that the land on which the *otta* stood is his property, and that it does not form part of the public road Public roads are under the Land Revenue Act (Bombay Act V of 1879) vested in the Government of Bombay, and the Government therefore are “ interested to deny ” the plaintiff's title to the land (s)

“ **Further relief.** ”—A suit should not be dismissed if a plaintiff, being able to seek further relief, omits to do so All that is provided by this section is that the Court shall not make a declaration in the events specified in the proviso, not that the Court shall not grant the relief that is prayed (t) Where the plaintiff omits to seek further relief, and applies for an amendment in the Court of first instance, the Court should allow the amendment (u) Where the objection that the plaintiff has omitted to seek further relief is taken for the first time in appeal, the Court should not refuse to make the declaration, but allow the plaintiff an opportunity of amending the plaint (v) But no such amendment should be allowed where the objection is taken in the Court of first instance and the plaintiff notwithstanding persists in continuing the suit as framed (w)

(s) *The Secretary of State for India in Council v. Jethabhai* (1893) 17 Bom 293

(t) *Sakharam v. The Secretary of State for India* (1904) 28 Bom 332, *Kunj Bihari Prasadji v. Kesharlal* (1904) 28 Bom 567

(u) *Kalabhai v. The Secretary of State for India* (1905) 29 Bom 19, 29, *Mohammad Sadiq v. Allah Bakhsh* (1929) 120 I C 531

(v) *Limba v. Jama* (1889) 13 Bom 548, *Chomu v. Umma* (1891) 14 Mad 41

*Charan Das v. Jamna Devi* (1928) 10 Lah 493, 112 I C 48, does not seem reconcilable with these decisions though on principle it seems correct that particular acts authorised by an existing operative instrument cannot be declared invalid without cancelling the instrument Cp *Danta Singh v. Diwan Singh*, 115 I C 539 A I R 1029 Lah 11

(w) *Suryanarayanamurti v. Tammananna* (1902) 25 Mad 504, 506, *Narayana v. Shankunni* (1892) 15 Mad 255, 257-258, *Raj Narain Das v. Shama Nanio Das*

# THE SPECIFIC RELIEF ACT, 1877.

In a suit where the plaintiffs prayed for a declaration that they were entitled to a two fifths share of property in the possession of the defendants, the Allahabad High Court held that the proviso to s 12 did not apply, as relief by way of partition would be granted by the Collector (x) This appears to be unsound The relief is granted by the Court though the Collector is the officer of execution In any case the plaintiffs should have asked for joint possession

A suit for a declaration of right to pre empt would not lie if not followed by a prayer for consequential relief (y)

Injunction is "further relief" within the meaning of the proviso (z) And so is cancellation (a) A suit therefore for a declaration and an injunction or for a declaration and cancellation is a suit in which further relief is sought (b) But where in addition to an injunction the plaintiff might have prayed for possession but omits to do so the Court should not make the declaration Thus a plaintiff suing for a declaration that he is the Sheik of Kalli and entitled as such to all the properties attached thereto and for an injunction against the defendant to restrain him from dealing with the properties ought to pray for possession of the properties if they are in the defendant's possession at the date of suit The reason is that the further relief which the plaintiff is bound to claim is such relief as he would be in a position to claim from the defendant in an ordinary suit by virtue of the title which he seeks to establish and of which he prays for a declaration' (c) But a plaintiff suing for a declaration that a conveyance of property by defendant A to defendant B taken by B with notice of a prior agreement for sale of the property by A to the plaintiff is not binding on the plaintiff, and for specific performance of the agreement is not obliged to pray for delivering up and cancellation of the conveyance in such a case the suit is primarily one for specific performance that is for

(1899) 26 Cal 845 *Shiv Ram v Bhag Devi* (1918) Punj Rec No 118 p 374 48 I C 838

(x) *Papan Pasi v Subh Karam Rasi* (1919) 41 All 207 49 I C 367

(y) *Chanran Das v Amir Khan* (1911) 48 Cal 110 67 I C 606 P C

(z) *Luny Bhardi Iarsadji v Keslavlal* (1904) 28 Bom 567 *Deokals Koer v Kedar Nath* (1911) 39 Cal 704 Sec s 52 of the Act

(a) *Tacoordeen v Nawab Syed Ali* (1874) L R 11 V 192 13 Beng I R 427 See s 39 of the Act

(b) Conversely a suit merely for declaration will not be entertained where the real object is to set aside a decree *Rajbans Sahay v Askaran Baid* 190 I C 113 A I R 1930 Pat 227

(c) *Abdulladar v Mahomed* (1892) 15 Mad 15

S. R. A. of title as owner, and an injunction to restrain the wrongdoer from  
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“Further relief.”—A suit should not be dismissed if a plaintiff, being able to seek further relief omits to do so. All that is provided by this section is that the Court shall not make a declaration in the events specified in the proviso, not that the Court shall not grant the relief that is prayed (t). Where the plaintiff omits to seek further relief, and applies for an amendment in the Court of first instance, the Court should allow the amendment (u). Where the objection that the plaintiff has omitted to seek further relief is taken for the first time in appeal, the Court should not refuse to make the declaration, but allow the plaintiff an opportunity of amending the plaint (v). But no such amendment should be allowed where the objection is taken in the Court of first instance and the plaintiff notwithstanding persists in continuing the suit as framed (w).

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|--------------------------------------|-----------------------------|
| (s) The Secretary of State for India | Charan Das v Jai Lal (1911) |
| in Council v Jellabhai (1893) 17 Bom | 403 112 I C 48 do 311       |
| 203                                  | able with the 11            |

(t) *Sakharam v. The Secretary of State for India* (1904) 28 Bom 332, *Kunj Bihari Prasad v. Keshavlal* (1901) 28 Bom 567

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|---|----------------|
| (u) <i>Kalabai v The Secretary of State</i>       | 1914 8 174 v 1 |
| <i>for India</i> (1905) 29 Bom 19 29 <i>Moham</i> | 539 v 1 1 1    |
| <i>mad Sadig v Allah Bakhsh</i> (1929) 120        | (1) 8 v        |
| IC 531  | (1) 2 v        |

(1) *Jimba v Jama* (1889) 13 Bom *Sl a l*  
[18, *Chomu v Umma* (1891) 14 Mad 11 *I j v*

not to be extended to the case of all third parties who may possibly support some of the contentions of the defendant " (k)

A plaintiff suing for a declaration that property bequeathed by his father to the defendant (his brother) was ancestral, and that his father had no power to bequeath it, and that he was entitled to it by survivorship along with the defendant, ought to pray for partition of the property even if it be in the possession of tenants (l). Similarly, a plaintiff suing for a declaration of his right to succeed on his father's death to a *talukdari* estate to the exclusion of the defendant who claimed to be a legitimate son of his father, and to whom during his minority the Talukdari Settlement Officer was making an allowance for his maintenance under Bombay Act XXI of 1881, ought to pray for an injunction restraining the defendant from receiving the allowance (m). Where the plaintiffs, alleging that the defendant was in possession of a mutt and of the mutt properties under a false claim of title as successor of the late Jheer, sued for a declaration that he was not the duly appointed successor of the late Jheer and for the appointment of some duly qualified person as Jheer, it was held that no such declaration could be made, as the plaintiff had omitted to ask for consequential relief namely that the mutt properties be handed over to the person so appointed (n).

The three cases cited above mark the extreme limits of the application of the proviso to this section. The trustees of a temple, suing for a declaration that certain proceedings of a District Temple Committee removing them from that office are illegal, are not obliged to pray that they should be reinstated in their office unless there has been an actual ouster of the plaintiffs from the office of trustees (o). In an Allahabad case, the plaintiff alleging that he was the owner and in possession of a house and that defendant A had without any title mortgaged the house to defendant B and that B having obtained a decree on the mortgage against A, had caused the house to be proclaimed for sale, sued A and B for a declaration that the house was not liable to be sold

(k) *Subramanjan v Paramaswaran* (1888) 11 Mad 116 122. *Banta Singh v Dican Singh* 110 I C 539 A I P 1909 Lah 11 adds nothing to the authorities already cited.

(l) *Suryanarayanamurti v Tammanna* (1907) 20 Mad 500.

(m) *Sardarsinghy v Ganpatsinghy* (1890) 14 Bom 390 (Candy J doubting).

(n) *Strinivasa v Strinivasa* (1893) 16 Mad 31.

(o) *Pamanuja v Detanajaka* (1880) 8 Mad 361.

S. R. A.  
S 42

in execution of the decree It was held that the plaintiff was entitled to a declaration, and that the omission of a prayer to set aside the mortgage and the decree was no bar to the declaration The Court said "There was no obligation on the plaintiff, even under the proviso to section 42, to have sued to set aside the mortgage or the decree, and indeed, it is doubtful in our opinion if he had asked for such relief that he could have succeeded" (p)

The High Court of Madras has held that a plaintiff suing for a declaration of title to land ought to pray for payment of arrears of rent The Court said "The object of the proviso to section 42 is to avoid multiplicity of suits and to prevent a person getting a declaration of right in one suit and, immediately after, the remedy already available in another" (q) On the other hand, it has been held by the High Court of Calcutta that "further relief" within the meaning of this section does not include a claim for arrears of rent and that omission to sue for arrears of rent is no bar to the Court making the declaration asked for The Court said "The further relief referred to in the proviso is, we think, further relief in relation to the legal character or right as to any property which any person is entitled to and whose title to such character or right any person denies or is interested in denying" (r) A plaintiff suing the defendants for a declaration that they are his tenants is not obliged to pray for possession (s) In a suit under s 92 of the Civil Procedure Code (public charities), no consequential relief can be claimed beyond what is allowed by the provisions of that section (t) See Mull's Code of Civil Procedure, notes to s 92

The proviso to this section refers to the position of the plaintiff at the date of suit (u) Hence where a suit for a declaration, when instituted, is in every respect regular, no action on the part of the defendant subsequent to the institution of the suit can affect or pre-

(p) *Ganga Ghulam v Tapeshree Prasad* (1904) 26 All 606

(q) *Kombi v Aundi* (1890) 13 Mad 75

(r) *Fakirchand v Anund Chunder* (1887) 14 Cal 586-591

(s) *Loke Nath v Keshab Pam* (1886) 13 Cal 147, 151

(t) *Nets J ama v Venkatesharudu* (1903) 26 Mad 450

(u) *Govinda v Perundevi* (1899) 12 Mad 13f Cp *Sri Thal v Maharaj v Kamka Prasad*, 120 I C 143, A I R 1929 All 574, (1929) A L J 1201, a curious case of suit on behalf of idols where the Court was divided on every thing except that in its discretion it would not make any declaration

judice the right of the plaintiff (v) Similarly any change of circumstances brought about by the plaintiff himself purchasing the property in respect of which the suit is brought does not take away the right to sue which had accrued to him prior to the date of the suit (w)

**Where no right to further relief shown**—Under s 15 of the Code of Civil Procedure 1859 it was held that a declaratory decree could not be made unless there was a right to consequential relief capable of being had in the same Court or in some cases in some other Court *e g*, a Revenue Court (x) Under the present section a suit would lie for a merely declaratory decree though no consequential relief could be claimed *e g*, a suit by an owner of land against any member of the public who formally claims to use such land as a public road and who thereby endangers the title of the owner (y) or a suit for a declaration that the defendant is not the plaintiff's son (z)

**Reversionary heir**—The next reversioner for the time being to the estate of a deceased Hindu expectant upon the widow's death may sue the widow and an alienee of the estate from her for a declaration that the alienation made by her is void beyond the widow's lifetime [ill (e)] He may also sue the widow and a son adopted by her for a declaration that the adoption is invalid [ill (f)] But the mere fabrication by a widow of a document purporting to be an authority to her from her husband to adopt does not entitle him to claim a declaration that the document is fabricated The deed of authority by itself cannot affect the plaintiff's right to any property though the further act of adoption in pursuance of the authority would The authority is not the proximate cause of any injury to the plaintiff's rights (a)

The next reversioner may also sue the widow to restrain her from wasting her husband's estate [s 51 ill (m) p 873 below] But when he sues the widow alleging waste and fails to prove any wrongful act on her part he is not entitled to a mere declaration that he is the next reversionary heir Such a declaration is unavailing as well as premature (b)

See notes below under the head Contingent interest on next page

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| (v) <i>Pam Adhar v Ran Shanler</i> (1904) | 15 Cal 461 [F B]                           |
| 38 All 215                                | (z) <i>Iakt ba v Agarsinghji</i> (1910) 34 |
| (w) <i>Wamanrao v R stomji</i> (1897) 21  | Bom 676 681-682                            |
| Bom 701                                   | (a) <i>Sreepada v Sreepada</i> (1912) 30   |
| (x) <i>Kathama Vatchiar v Doras nga</i>   | Mad 592 12 I C 176                         |
| (1875) L R 2 I A 169 187                  | (b) <i>Janaki Ammal v Narajana</i>         |
| (y) <i>Chuni Lall v Pan K shen</i> (1888) | 41yer (1916) L R 43 I A 20 39 Ma 1         |

S. R. A.  
S. 42.

**Vested interest.**—A person having a vested interest, though it be after a series of life estates, is entitled to maintain a suit under this section against the first life-tenant for a declaration that the first life-tenant has no more than a life estate and against a transferee of the entire estate from him (c)

**Contingent interest**—Both under s 50 of the Chancery Procedure Act and s 15 of the Code of Civil Procedure, 1859, it was held that a mere contingent right, which may never have existence, is not sufficient to ground an action for declaration (d) The interest of a Hindu reversioner during the widow's life is future, and contingent Such being the case, he could have no right under s 15 of the Code to sue for a declaration in the widow's lifetime that an alienation made by her of her husband's estate is void beyond the widow's lifetime But his case was treated as an exception, and it was held that he could maintain such a suit under s 15 of the Code (e) Since the Specific Relief Act the case is covered by illustration (e), and it is laid down that under this section "where any deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed" (f), the object being the preservation of the estate (g) But there is a settled rule of practice against the grant of such relief when the only question for decision is which of two persons is entitled to the character of next reversioner (h)

634, 37 I C 101, *Thukurain Jaipal Kunwar v Bhaya Indar Bhadur Singh* (1904) L R 31 I A 67, 70, *Lalu v Fazal Din* (1923) 4 Lah 106, 73 I C 893, A I R 1923 Lah 403

(c) *Pamanand Koer v Ragunath Koer* (1882) L R 9 I A 41 53, 8 Cal 769

(d) *Lady Langdale v Briggs* (1856) 8 De G M & G 391, *Jackson v Turnley* (1833) 1 Drew 617

(e) *Iers Dutt Koer v Hansibits Koerain* (1883) L R 10 I A 150 155-156 10 Cal 324, *Katlama Natchiar v Dorasinga* (1875) I R 2 I A 169, 191, 15 Beng L R 83

(f) *Saugalar Singh v Parlip Singh*

(1917) L R 45 I A 21, 45 Cal 510, 43 I C 481 (the argument seems to have been directed mainly to a more limited question of practice, see L R 45 I A at p 23) See also *Sarrayya v Annapuramma* (1910) 42 Mad 699 52 I C 380, *Das Ram Choudhury v Tirtha Nath Das* 51 Cal 101, 81 I C 522, A I R 1924 Cal 481

(g) *Balmakund Lal v Sohano Luerti*, 8 Pat 153, 119 I C 817, A I R 1929 Pat 164

(h) *Iama Pao v Iaya of Jaitapur* (1919) 42 Mad 219, 43 I C 835, and see the paragraph 'Reversionary heir,' last page

43. A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Effect of declaration

*Illustration*

A, a Hindu, in a suit to which B, his alleged wife, and her mother are defendants, seeks a declaration that his marriage was duly solemnised and an order for the restitution of his conjugal rights. The Court makes the declaration and order. C, claiming that B is his wife, then sues A for the recovery of B. The declaration made in the former suit is not binding upon C.

See the Code of Civil Procedure, 1908, s. 11

## CHAPTER VII.

### OF THE APPOINTMENT OF RECEIVERS

44. The appointment of a Receiver pending a suit is a matter resting in the discretion of the Court.

Appointment of Receivers discretionary

The mode and effect of his appointment, and his rights, powers, duties and liabilities, are regulated by the Code of Civil Procedure (i).

Reference to Code of Civil Procedure

## CHAPTER VIII

### OF THE ENFORCEMENT OF PUBLIC DUTIES

45. Any of the High Courts of Judicature at Fort William, Madras, Bombay and Rangoon (j) may make an order (k) requiring any specific act to be done or forborne, within the local

Power to order public servants and others to do certain specific acts

(i) Act V of 1908, Order XL.  
(j) "Bombay and London substituted for" and Bombay by Act VI of 1923 Sch. I. Not any other High Court. *Mohammad Farid v. Commr. of Income Tax*, 9 Lah. 317, 10 J. I. C. 167, A. I. R. 1927 Lah. 513. Still less a District Judge. *Kanayyalal v. Secy. of State*, 27 B. L. R. 368, 87 I. C. 475, A. I. R. 1925 Bom. 255 (application for injunction

to restrain holding election on alleged erroneous list of voters). Cp. *Pam. Lagrah Singh v. Jcnaraj Hindu University*, 47 All. 434, 445, 85 I. C. 615, A. I. R. 1925 All. 253.

(k) As to the proper form of application in the Bombay H. C., see *P. Madhadas*, 50 B. L. R. 1114, 113 I. C. 619, A. I. R. 1925 Bom. 431.

S R A  
S 45

limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature

Provided—

- (a) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act,
- (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character,
- (c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice,
- (d) that the applicant has no other specific and adequate legal remedy, and
- (e) that the remedy given by the order applied for will be complete

Exemptions from  
such power

Nothing in this section shall be deemed to authorise any High Court—

- (f) to make any order binding on the Secretary of State for India in Council, on the Governor General in Council, on the Governor of Madras in Council, on the Governor of Bombay in Council, or on the Lieutenant Governor of Bengal,
- (g) to make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown, or
- (h) to make any order which is otherwise expressly excluded by any law for the time being in force

**Mandamus**—The writ of mandamus (*we command*) is a high prerogative writ (so called as being an exercise of extraordinary royal

justice) of a most extensive remedial nature. In form it is a command issuing in the King's name from the King's Bench Division of the High Court of Justice, and directed to any person, corporation, or inferior Court of Judicature requiring him or them to do something therein specified which appertains to his or their office, and which the Court holds to be consonant to right and justice (l). It is used principally for public purposes, and to compel the performance of public duties. It is, however, also used to enforce private rights when they are withheld by public officers. The conditions under which the writ is issued in England are in substance the same as those set forth in ss 45 and 46 of the present Act.

Before the passing of the present Act the Supreme Courts, and after they were abolished the High Courts, had the power to issue the writ of mandamus. This power was taken away by the present Act (s 50) (m), and a power was conferred instead to issue a peremptory order to do or forbear a specific act (s 47). But this is a change not so much in substance as in form, and in dealing with applications under the present chapter, the principles applicable to a writ of mandamus should, generally speaking, be followed (n).

**Scope of the chapter**—The present chapter deals with the enforcement of public duties. S 45 enables the High Courts of Calcutta, Madras and Bombay to make an order requiring *any specific act* to be done or forborne in the circumstances mentioned in that section. S 46 provides that the application must be founded on an affidavit of the person injured, stating (1) his right (2) his demand of justice and (3) the denial thereof. The *applicant* must be a person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the specific act. *The party against whom the order may be made* must be a public servant, or an inferior Court, or a corporation, upon whom the doing or forbearing of the specific act is clearly incumbent under any law for the time being in force. The Court may in its discretion refuse or grant the application. If the application is granted, a *peremptory order* is issued to do or forbear the act.

(l) 3 Bl Com 110, Com Dig, title  
'Mandamus.'

(m) An adventurous attempt to limit  
the effect of this section was made in  
*Krishnaballabh Sahay v Governor of*

*Bihar and Orissa* 5 Pat 595, 96 I C.  
791 A I R 1926 Pat 395

(n) *Provas Chandra Poy, In re* (1913)  
40 Cal 588 597, 18 I C 52

**S. R. A.** limits of its ordinary original civil jurisdiction, by any person  
**S. 45.** holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature :  
 Provided—

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- (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character ;
- (c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice ;
- (d) that the applicant has no other specific and adequate legal remedy ; and
- (e) that the remedy given by the order applied for will be complete.

Exemptions from  
such power.

Nothing in this section shall be deemed to authorise any High Court—

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- (g) to make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown ; or
- (h) to make any order which is otherwise expressly excluded by any law for the time being in force.

**Mandamus.**—The writ of mandamus (*see command*) is a high prerogative writ (so called as being an exercise of extraordinary royal

justice) of a most extensive remedial nature. In form it is a command issuing in the King's name from the King's Bench Division of the High Court of Justice, and directed to any person, corporation, or inferior Court of Judicature requiring him or them to do something therein specified which appertains to his or their office, and which the Court holds to be consonant to right and justice (*l*) It is used principally for public purposes, and to compel the performance of public duties It is, however, also used to enforce private rights when they are withheld by public officers The conditions under which the writ is issued in England are in substance the same as those set forth in ss 45 and 46 of the present Act

Before the passing of the present Act the Supreme Courts, and after they were abolished the High Courts, had the power to issue the writ of mandamus This power was taken away by the present Act (s. 50) (*m*), and a power was conferred instead to issue a peremptory order to do or forbear a specific act (s. 47) But this is a change not so much in substance as in form, and in dealing with applications under the present chapter, the principles applicable to a writ of mandamus should, generally speaking, be followed (*n*)

**Scope of the chapter.**—The present chapter deals with the enforcement of public duties S. 45 enables the High Courts of Calcutta, Madras and Bombay to make an order requiring *any specific act* to be done or forborne in the circumstances mentioned in that section S. 46 provides that the application must be founded on an affidavit of the person injured, stating (1) his right, (2) his demand of justice, and (3) the denial thereof The *applicant* must be a person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the specific act *The party against whom the order may be made* must be a public servant, or an inferior Court, or a corporation, upon whom the doing or forbearing of the specific act is clearly incumbent under any law for the time being in force The Court may in its discretion refuse or grant the application. If the application is granted, a *peremptory order* is issued to do or forbear the act

(*l*) 3 Bl Com 110, Com Dig, title "Mandamus"

(*m*) An adventurous attempt to limit the effect of this section was made in *Krishnaballabha Sahay v. Governor of*

*Bihar and Orissa*, 5 Pat 595, 96 I C. 791, A I R 1926 Pat 595

(*n*) *Prorvas Chandra Poy, In re* (1913) 40 Cal 555, 597, 18 I C. 527

S. R. A.  
S. 45.

**High Courts.**—The only Courts empowered to make an order under this chapter are the High Courts of Calcutta, Madras and Bombay in the exercise of their ordinary original civil jurisdiction. The High Court of Allahabad has no such jurisdiction, and hence it is not mentioned in s 45

**Conditions to be satisfied before making an order under sec. 45.**—These are set forth in cls (a) to (e) of the proviso to the section. These conditions are cumulative, so that no order can be made under this section unless they are all satisfied (o)

“Requiring a specific act to be done or forborne.”—This section enables the Court to make an order requiring any *specific act* to be done or forborne, and nothing else. It does not empower the Court to make any declaration. Thus the Court has no power under this section to declare that a notification in the *Calcutta Gazette* notifying that the applicant was debarred from taking part in an examination for a period of five years is illegal and *ultra vires*, or that the Board of Examiners acted illegally in not entertaining his application to appear at the examination (p)

The omission of a statutory officer to perform his public duties as to the settlement of the election roll in the manner provided by law is forbearing to do an act within the meaning of this section (q). And so is the rejection *mala fide* by a municipal corporation of plans for building submitted to the corporation for their approval (r).

Where discretion is vested in a public officer under a statute to do or not to do an act, but the discretion is not an absolute one, it must be exercised within the limits prescribed by the statute. Thus where power is given to the Commissioner of Police under an Act to grant licenses for public conveyances, and it is provided by the Act that the Commissioner may in his discretion refuse to grant any such license for ‘any conveyance which he may consider to be insufficiently formed or otherwise unfit for the conveyance of the public,’ the Commissioner

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(o) *Rustom v Kennedy* (1902) 28 Bom 390, 401, *Abdul Rasul, In re* (1914) 41 Cal 518, 24 I C 401

(p) *Provas Chandra Poy, In re* (1913) 40 Cal 583, 18 I C 527. See *Rudra Narain Poy* (1901) 23 Cal 479, which was a similar case. As to the last case Jenkins C.J. said in *Provas Chandra Poy* & case “I confess I do not understand that decision” see 40 Cal, p 591

(q) *Sen, In the matter of* (1912) 39 Cal 598, 14 I C 682, *In re Surendra Chandra Ghose* (1918) 45 Cal 950, 49 I C 451

(r) *Irosal Chunlra De v Corporation of Calcutta* (1913) 40 Cal 830, 815, 22 I C 238

has no power to refuse a license merely because a conveyance does not conform to a particular pattern, and the Court may under this section direct him to issue the license asked for (s). But the Court cannot interfere if the discretion is properly exercised (t). The High Court of Calcutta has refused to review the decision of a returning officer, made in good faith and within his jurisdiction, on the validity of a nomination (u), also to dictate to the President of the Bengal Legislative Council how he should regulate matters of procedure (v).

**Person holding a public office**—The syndicate of the Madras University is a statutory body of persons "holding a public office" within the meaning of this section though no emoluments are attached to that office. The High Court therefore has the power under this section to entertain an application by a Fellow of the Madras University for an order against the syndicate directing the syndicate to forward to the Government a protest of his under a regulation of the University against a resolution of the senate. The Fellow, as the author of the rejected protest, has a specific right to ask that his protest should be sent to its proper destination and not the less so because any other member whose protest was rejected would have a similar right (w).

**Corporation**—It is doubtful whether a private company is a corporation within the meaning of this section (x).

**"In his or its public character"**—A public officer specially employed for work like that of his office but outside its duties is not acting in his public character and is not amenable to the present section (y).

(s) *Gell v Taji Noora* (1903) 27 Bom 307. So where a Commissioner refused a licence under a mistaken belief that under a local Act he was deprived of jurisdiction. *Alimahomed v Bombay Municipal Commr*, 27 B L R 581, 87 I C 771, A I R 1925 Bom 458.

(t) *Haji Ismail v The Municipal Commissioner* (1904) 28 Bom 253 [license to keep buffaloes].

(u) *Manindra Chandra Nandy v Provas Chandra Mitter*, 51 Cal 279, 79 I C 1042. A I R 1924 Cal 761, *cp U Po Thia v Burjorjee*, 5 Rang 504, 105 I C 428, A I P 1927 Rang 324.

(v) *Sen Gupta v Cotton* (1924) 51 Cal 874, 82 I C 374.

(w) *Natesan In the matter of* (1917) 40 Mad 125, 38 I C 847. See also *Gammelar v The Controller of Patents and Designs* (1918) 45 Cal 606, at pp 610-612, 616, 48 I C 437.

(x) *Gilbert, Ex parte* (1892) 16 Bom. 398, 401.

(y) *Jafferbhoy Abdullabhoy v Mahomedally* 50 Bom 325, 93 I C 918, A I R 1926 Bom 247 (taxing officer of High Court employed by special commissioners for election petition).

S. R. A.  
S. 45

**Inferior Court of Judicature**—The High Court of Bombay has the power under this section to direct the Chief Judge of the Small Causes Court at Bombay to do a specific act, the latter Court being an inferior Court within the local limits of the ordinary original civil jurisdiction of the High Court. Thus where in a municipal election case the Chief Judge of the Small Causes Court, thinking that he had no jurisdiction, declined to inquire into the claims of certain candidates the High Court directed him to proceed with the inquiry (z). Similarly in a Calcutta case the High Court directed a Presidency magistrate to furnish a prosecutor whose complaint had been dismissed with copies of the order made by the magistrate and of the depositions taken before him (a).

**Personal right**—The privilege which a member of a corporation has to inspect the documents of the corporation is confined to cases where the member has in view *some definite right or object of his own* and to those documents which would tend to illustrate such right or object. No order, therefore, can be made under this section where the applicant has no special interest in any of the matters complained of by him, or any interest other than, or different from, that of each member of the corporation, and he has no definite right or object of his own to aid or serve in asking for inspection of the corporation's register, or right or object which the register would illustrate, but, on the contrary, his object is to obtain the inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the corporation's affairs (b).

The right of an individual to have a license granted to him for an eating house under an Act by the Commissioner of Police, the Commissioner having no discretion to refuse the license, is a "personal right" within the meaning of this section, and the refusal to grant the license is an injury to such right (c).

A person who has been provisionally appointed a lecturer of a University has no "personal right" such as would entitle him to apply under this section for an order directing the senate of the University to continue him in the appointment as a lecturer (d).

|  |  |                               |
|--|--|-------------------------------|
| (z) <i>Sarafull J Mamooji In the matter of</i> | Bom 476 478                                | <i>Rex v Merchant Tailors</i> |
| (1910) 34 Bom 659, 71 C 958                    |  | Co (1831) 2 B & Ad 115        |
| (a) <i>Bank of Bengal v Dinonath Poy</i>       | (c) <i>Custom v Kennedy</i> (1902) 26 Bom  |                               |
| (1882) 8 Cal 166                               | 376  |                               |
| (b) <i>Bank of Bombay v Suleman Sonji</i>      | (d) <i>Abdul Husul In re</i> (1914) 41 Cal |                               |
| (1908) 1 B 35 I A 130, 135-138 72              | 518 24 I C 404 (where there was a case     |                               |

**Clearly incumbent under any law for the time being in force**—No order can be made under this section unless the doing or forbearing an act is, under any law for the time being in force, clearly incumbent upon the party to be affected thereby To determine whether it is incumbent or not, regard must be had to the provisions of the Act under which it is alleged the act ought to have been done or forborne (c) Regulations made under an Act, where the making of such regulations is authorised by the Act, are "law" within the meaning of this section (f)

**Other specific and adequate legal remedy**—No order can be made under this section if there be other specific and adequate legal remedy Thus an order cannot be made under this section directing the directors of a company to register the applicant's name as a shareholder as a specific and adequate remedy is afforded by the Companies Acts (g), nor to enforce the performance of public statutory duties which the Legislature has specially authorized the Governor of the Province to enforce (h) Similarly no order can be made under this section where the applicant has the ordinary legal remedy of an execution (i) An opinion has been expressed in the Calcutta High Court (j) that the specific remedy here mentioned is 'some specific remedy expressly given by a particular Act' It is submitted that this limitation is in correct, though it is true that the mere possibility of a right of action is not enough to bar resort to this section

**Exemptions**—The Madras High Court held that s 106 of the Government of India Act prohibited the High Court from entertaining an application requiring an income tax officer to make a reference under s 51 Income Tax Act 1918 (k) But the Privy Council dis

recommendation and not even a provisional appointment] B L R 416

(e) *Mutty Lall Ghose In the matter of* (1892) 19 Cal 192 *Corihill In the matter of* (1895) 22 Cal 717 *Bholaram v The Corporation of Calcutta* (1905) 36 Cal 671

(f) *Natesan In the matter of* (1917) 40 Mad 125 38 I C 847

(g) *Gilbert Ex parte* (1892) 16 Bom 398

(h) *Bombay (Trustees of Port) v Bombay (Municipal Corporation)* 125 I C 897 A I R 1930 Bom 232 32

(i) *Kesho Prasad v The Board of Revenue* (1911) 38 Cal 553 10 I C 253

(j) *Re Manick Chand Mahata v Corporation of Calcutta and Calcutta Improvement Trust* (1922) 48 Cal 916 924 66 I C 600 There are some words about a general right of suit which we confess ourselves unable to understand

(k) *Chief Commissioner of Income Tax v North Anantapura Gold Mines Ltd* (1921) 44 Mad. 718, 64 I C 682

S. R. A.  
Ss. 45-48.

approving of this decision, have held that the words of s 106—"may not exercise any original jurisdiction in any matter concerning the revenue"—do not prevent a High Court ordering a revenue officer to do his statutory duty (l) A Commissioner of Income Tax may accordingly be ordered to state a case on a point of law under s 33 of Act XI of 1922 (m)

46. Every application under section 45 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof, and the High Court may, in its discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made

If in the last case, the person, Court or corporation complained of shows no sufficient cause, the High Court may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf

47. If the person, Court or corporation to whom or to which such order is directed makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely

48. Every order under this Chapter shall be executed, and may be appealed from, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court

(l) *Alcock, Ashdown & Co v Chief Revenue Authority Bombay* (1923) L R 50 I A 227, 47 Bom 742, 28 C W N 762, 71 I C 392 See further *I E A Chellayar Firm v Commr of Income Tax*, 7 Ran 581 121 I C 769, A I R 1930 Ran 37 (m) *I e Sheik Abdul Kadir Marikajar & Co*, 40 Mad 725, 69 I C 221 A I R 1926 Mad 1071

49. The costs of all applications and orders under this  
Costs Chapter shall be in the discretion of the High  
 Court

50. Neither the High Court nor any  
Bar to issue of Judge thereof shall hereafter issue any writ  
mandamus of *mandamus*

See notes to s 45, "*Mandamus*," pp 860, 861, above

51. Each of the said High Courts shall, as soon as  
Lower to frame conveniently may be frame rules to regulate  
rules the procedure under this Chapter, and, until  
 such rules are framed the practice of such Court as to appli-  
 cations for and grants of writs of *mandamus* shall apply,  
 so far as may be practicable, to applications and orders under  
 this Chapter

## PART III

### OF PREVENTIVE RELIEF

**Introduction to Part III**—It is not practicable here and it would be unprofitable for any reasonable Indian purpose if it were practicable to enlarge on the law and practice of injunctions in England (n) The governing principles however are fairly simple and the nice questions formerly raised by the jurisdiction being confined to Courts of equity are now matter of the past An injunction is a specific order of the Court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun or in some cases (when it is called a mandatory injunction) commanding active restitution of the former state of things Obedience to a negative injunction however may in fact involve much more than simple forbearance for example where the execution of necessary public works in a particular way is restrained as being a nuisance and an alternative way free from that objection has to be found Disobedience to an injunction is punishable as contempt of Court by imprisonment in the case of a natural person and sequestration in the case of a corporation or quasi corporate body

(n) A convenient summary is given in for a shorter statement see Pollock on  
 Encycl Laws of England 2nd ed, 1907 Torts 13th ed 19"

S. R. A.  
Ss. 45-48.

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(l) *Alcock Ashdown & Co v Chief Revenue Authority Bombay* (1923) L R 50 I A 227, 47 Bom 712, 28 C W N 762, 71 I C 392 See further *I E A Chettyar Firm v Commr of Income Tax*, A I R 1926 Mad 1051

(m) *Ran 581* 121 I C 769 A I R 1930 Ran 37  
(n) *I e Sheik Abdul Kadir Maralajar & Co*, 49 Mad 725, 99 I C 221 A I R 1926 Mad 1051

49. The costs of all applications and orders under this Chapter shall be in the discretion of the High Court.

50. Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*.

See notes to s. 45, "*Mandamus*," pp. 860, 861, above.

51. Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure under this Chapter; and, until such rules are framed, the practice of such Court as to applications for and grants of writs of *mandamus* shall apply, so far as may be practicable, to applications and orders under this Chapter.

## PART III.

### OF PREVENTIVE RELIEF.

**Introduction to Part III.**—It is not practicable here, and it would be unprofitable for any reasonable Indian purpose if it were practicable, to enlarge on the law and practice of injunctions in England (n) The governing principles, however, are fairly simple, and the nice questions formerly raised by the jurisdiction being confined to Courts of equity are now matter of the past. An injunction is a specific order of the Court forbidding the commission of a wrong threatened, or the continuance of a wrongful course of action already begun, or in some cases (when it is called a mandatory injunction) commanding active restitution of the former state of things. Obedience to a negative injunction, however, may in fact involve much more than simple forbearance, for example where the execution of necessary public works in a particular way is restrained as being a nuisance, and an alternative way free from that objection has to be found. Disobedience to an injunction is punishable as contempt of Court by imprisonment in the case of a natural person and sequestration in the case of a corporation or quasi-corporate body.

(n) A convenient summary is given in Encycl. Laws of England, 2nd ed., 1907; for a shorter statement see Pollock on Torts, 13th ed., 197.

**S. R. A.  
Part III.**

• An injunction will not be granted where there is an adequate remedy in damages. This rule is parallel to that which, as we have seen, limits the remedy of specific performance. It does not apply to the protection of purely equitable rights (in the technical English sense of equity jurisdiction), for the plain reason that for violation of such rights there could be no damages at all, the Court of Chancery having no power to award them. Subject to this rule the remedy is said, like that of specific performance, to be discretionary, but, the parallel still holding, this does not prevent constant practice from having made it really matter of right in its most important and usual applications. Where a continuing nuisance is proved to violate an established legal right, the Court cannot refuse an injunction merely on its own estimate of the balance of convenience in the particular case. Accordingly in a large proportion of the reported decisions it will be found that the real matter in dispute was not the propriety of the remedy, but the legal recognition of the right said to be infringed, or the validity of some justification or excuse set up in defence. Such cases do not only concern procedure, but belong not less to the substantive law of the classes of rights involved. The illustrations to s 54 of this Act will offer examples to the judicious reader. In practice the points of law may be and often are inextricably mixed with controversy about the facts, which is rather apt to take the form of conflict between expert witnesses, and many of the reports are valuable chiefly as exhibiting the manner in which the Court applies the settled law to disputes of fact in more or less novel circumstances.

The special application of this remedy to obligations undertaken by contract has given rise to some trouble in England. If A has expressly agreed with B *not to do a certain thing*—not to compete with him in his business for a limited time after leaving his employment, to take one common example—if the agreement is enforceable by law, and if damages would not be an adequate remedy to B for a continuing breach of this agreement, then the Court will protect B by restraining A from acting in defiance of his contract (o). So far there is no serious

(o) "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant,

that the thing shall not be done it is the specific performance, by the Court, of the negative bargain which the parties have made." Lord Cairns, *Doherty v Allman* (1878) 3 App. Cas. 709, 720.

difficulty. But an undertaking to forbear is not necessarily expressed in negative terms. A covenants that *he will take all the electrical energy he requires* from the X Co., at a specific price (or scale of prices) and with various ancillary conditions. Read according to its strict affirmative tenor, this is an idle agreement, for A is not bound to take any current at all from the X Co. To make it significant and really operative as intended, it must be read as an undertaking by A not to take electrical energy from any other source of supply (p). This, again, is only matter of reasonable construction. But there may be a *negative undertaking coupled with a positive contract* of a kind which the Court will not—because it cannot completely or equitably—enforce by specific performance, such as a contract for skilled personal services. If the Court cannot compel Z to act or sing, to paint a picture, or manage a technical business for A, will it restrain him from doing for B that which he has promised but refuses to do for A? After some hesitation this was answered in the affirmative (q). But then must such a negative undertaking be expressed? That it need not be in grammatically negative terms is obvious, to hold to the mere verbal form would be to save judicial trouble at the expense of justice. But a contract to serve A for a certain time is not, without more, a contract not to serve any one else. For a time it seemed as if the law would go further, and from a contract for specially skilled service extending over a certain time would imply (and accordingly enforce by injunction) a promise not to render like service elsewhere during that time. The Specific Relief Act was framed when authority to that effect stood unreversed (r). Some years later, however, the Court of Appeal laid down that even a man's positive contract to give "the whole of his time" to his employer does not import a negative undertaking on which an injunction can be grounded. "Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do" but it does not at all follow that, because a person has agreed to do a particular thing he is therefore to be restrained from doing everything else which is inconsistent with it. The Court has never gone that length, and I do not

(p) *Metrop Electric Supply Co v Ginder* [1901] 2 Ch 799

(q) *Lumley v Wagner* (1852) 1 D M G 604, 91 R R 193

(r) *Montague v Flockton* (1873) L R 16 Eq 189 overruled by *Whitwood Chemical Co v Hardman* (see next note)

**S. R. A.**  
**Part III.**  
**Ss. 52, 53.**

suppose that it ever will" (s) This is the present law of English Courts and of jurisdictions where English decisions are followed (t), but the law of British India, fixed by the Specific Relief Act before it was so settled, is otherwise, as appears by illustration (d) to s 57, though the text is not quite so explicit, and by the decisions rendered under that section Such divergences are unfortunate, there is no doubt that the intention of the Specific Relief Act was to reproduce English law But, in the absence of any provisions for the periodical revision of codifying Acts, it is inevitable that they should sometimes occur

No further special comment from an English point of view, beyond notes on the illustrations, appears to be called for

## CHAPTER IX

### OF INJUNCTIONS GENERALLY

**52.** Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

Preventive relief, how granted

"At the discretion of the Court."—"The right to an injunction depends in India upon statute and is governed by the provisions of the Specific Relief Act (I of 1877) S 52 of that Act places the grant of an injunction in the discretion of the Court—a discretion to be exercised of course as the discretion of Courts always is" (u) "The discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal" (see s 22, p 793, above)

**53.** Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court They may be granted

(s) *Whitwood Chemical Co v McGregor* [1891] 2 Ch 413, 426 per Lindley LJ

(t) The opinion expressed in the sixth edition (1921) of Fry on Specific Performance, § 802, is that negative stipulations will not be implied except in the cases where the Courts have already done so and that even the presence of an

express negative stipulation will not be found a sufficient ground for jurisdiction unless the contract is of a kind of which specific performance can be granted This is confirmed by *Mortimer v Beckett* [1920] 1 Ch 571

(u) *Titaram v Cohen* (1905) 1 B 32 1 A 185, 192, 33 Cal 203, 218

at any period of a suit, and are regulated by the Code of Civil Procedure. S  
53

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

**Temporary injunctions**—See the Code of Civil Procedure, 1908, O. 39

## CHAPTER X.

### OF PERPETUAL INJUNCTIONS.

54. Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment (v) of, property, the Court may grant a perpetual injunction in the following cases (namely) —

- (a) where the defendant is trustee of the property for the plaintiff,
- (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
- (c) where the invasion is such that pecuniary compensation would not afford adequate relief (w);

(v) Lawful possession is therefore protected without proof of title, see note on "Continuing Trespass," p 877, below

(w) The suggestion in *Boyson v. Deane* (1899) 22 Mad at p 255, that this principle is not regarded in English doctrine,

S. R. A.  
S. 54.

(d) where it is probable that pecuniary compensation cannot be got for the invasion ;

(e) where the injunction is necessary to prevent a multiplicity of judicial proceedings (x).

EXPLANATION.—For the purpose of this section a trade-mark (y) is property.

*Illustrations*

[Most of the points here illustrated are now elementary in English law]

(a) A lets certain land to B, and B contracts not to dig sand or gravel thereout A may sue for an injunction to restrain B from digging in violation of his contract

(b) A trustee threatens a breach of trust His co trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach

(c) The directors of a public company are about to pay a dividend out of capital or borrowed money Any of the shareholders may sue for an injunction to restrain them (z)

(d) The directors of a fire and life insurance company are about to engage in marine insurances Any of the shareholders may sue for an injunction to restrain them

(e) A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger The Court may grant an injunction to restrain him from getting in the assets

(f) A, a trustee for B, is about to make an imprudent sale of a small part of the trust property B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief

(g) A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children A then contracts to sell the estate to C B or any of his children may sue for an injunction to restrain the sale

(h) In the course of A's employment as a vakil, certain papers belonging to his client, B, come into his possession A threatens to make these papers public, or to communicate their contents to a stranger B may sue for an injunction to restrain A from so doing

(i) A is B's medical adviser He demands money of B which B declines to pay A then threatens to make known the effect of B's communications to him as a patient This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing

(j) A, the owner of two adjoining houses, lets one to B and afterwards lets the other to C A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B B may sue for an injunction to restrain them from so doing

is erroneous What is true is that for a continuing nuisance damages are not presumed to be an adequate remedy

(x) Even if those proceedings were only suits to recover money *Mansa Tewari v Parmeshar Tewari*, 110 I C 879, A I R 1929 All 327, All L J (1929) 751

(y) As to the law relating to trade marks, see ss 478-489 of the Indian Penal Code (Act XLV of 1860)

(z) As to payment of interest out of capital by railway companies during construction, see s 3 of the Indian Railway Companies Act, 1895 (A of 1895)

## THE SPECIFIC RELIEF ACT, 1877.

(k) A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husbandlike manner.

[*Pratt v Brett* (1817) 2 Madd 62, 17 R R 187, apparently undefended.]

(l) A, B and C are partners, the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act.

[*Miles v Thomas* (1839) 9 Sim 606, 47 R R 320. Injunction refused on other grounds.]

(m) A, a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir expectant may sue for an injunction to restrain her.

(n) A, B and C are members of an undivided Hindu family. A cuts timber growing on the family property, and threatens to destroy part of the family house and to sell some of the family utensils. B and C may sue for an injunction to restrain him.

(o) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the official assignee and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

(p) The inhabitants of a village claim a right of way over A's land. In a suit against several of them A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.

(q) A, in an administration suit to which a creditor, B, is not a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debts. A may sue for an injunction to restrain B.

(r) A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.

(s) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for injunction restraining A from making the noise.

[*Soltau v De Held* (1851) 2 Sim N S 133, 89 R R 245.]

(t) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.

(u) A infringes B's patent. If the Court is satisfied that the patent is valid and has been infringed, B may obtain an injunction to restrain the infringement.

(v) A pirates B's copyright. B may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(w) A improperly uses the trade mark of B. B may obtain an injunction to restrain the user, provided that B's use of the trade mark is honest.

(x) A, a tradesman, holds out B as his partner against the wish and

S. R. A.  
S. 54.

without the authority of B B may sue for an injunction to restrain A from so doing

[*Routh v Webster* (1847) 10 Beav 561, 76 R R 211, *Walter v Ashton* [1902] 2 Ch 282 *Burchell v Wilde* [1900] 1 Ch 551, 563]

(y) A, a very eminent man, writes letters on family topics to B After the death of A and B, C, who is B's residuary legatee, proposes to make money by publishing A's letters D, who is A's executor has a property in the letters and may sue for an injunction to restrain C from publishing them

[A's eminence is immaterial Questions on the right to publish or restrain the publication of letters formerly gave much trouble in England See now *Robertson on Copyright* (1912) 133]

(z) A carries on a manufactory and B is his assistant In the course of his business A imparts to B a secret process of value B afterwards demands money of A threatening, in case of refusal, to disclose the process to C, a rival manufacturer A may sue for an injunction to restrain B from disclosing the process

**Discretion as to granting injunctions**—Injunctions are of two kinds, namely, (1) temporary and (2) perpetual Temporary injunctions are dealt with in O 39 of the Code of Civil Procedure Perpetual injunctions are dealt with in ss 54 to 57 of the present Act Whether the injunction sought is temporary or perpetual, the jurisdiction to grant is, as in the case of specific performance (s 22), discretionary (a) See s 52 above, and the notes thereto

**Perpetual injunctions**—"The granting of injunctions is now regulated by ss 54 and 55 of the Specific Relief Act But those sections have never been understood as introducing new principles of law in India, but rather as an attempt to express in general terms the rules acted upon by Courts of Equity in England, and long since introduced in this country, not because they were English law, but because they were in accordance with equity and good conscience" (b)

A perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication The obligation may arise from contract as in ill (a), or it may be in the nature of a trust (as defined in section 3) as in ill (b) to (h), or it may be an obligation the breach of which amounts to a tort or civil wrong of which ill (s) and (t) are prominent instances, or it may be any other legal obligation as in ill (i) and (z) As regards contracts the Court is to be guided, in granting an injunction, by the rules in Chapter II as to specific performance Where there is an invasion of

(a) *Titaram v Cohen* (1905) 1 R 32  
I A 185, 37 Cal, 203

(b) *Shamnugger Jute Factory Co v Ram Narain* (1887) 14 Cal 189 190

the plaintiff's right to, or enjoyment of, property, an injunction may be granted only in the five cases mentioned in cls (a) to (e) of the third paragraph. Where a breach of trust is threatened the Court may grant an injunction, even though compensation in money would afford adequate relief [ill (f)], this follows from cl (a) of the third paragraph.

**Injunction to prevent breach of contract**—By the second paragraph of this section it is provided that in dealing with cases of injunctions to prevent the breach of a contract, the Court is to be guided by the rules in Chapter II relating to specific performance. By s 56, cl (f), it is again enacted that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. By s 57 it is provided that notwithstanding s 56, cl (f), the Court may in certain cases grant an injunction. These cases are dealt with in the notes to s 57.

Ill (a) to the present section is a case in which the Court will grant an injunction to restrain the breach of the contract, as no amount of pecuniary compensation would afford adequate relief to the plaintiff if the contract is broken.

Amongst contracts of which the breach may not be prevented by an injunction are contracts which are dependent on the personal qualifications or volition of the parties. These contracts will not be specifically enforced [s 21, cl (b)] and an injunction will not be granted to prevent the breach thereof. Acting upon these principles, the Courts have refused to restrain employers from determining contracts with their employees where the services to be rendered by the latter were services of a personal nature e.g. a contract to work a railway line and keep the engines and rolling plant in repair (c) a contract to act as a manager of a tea estate (d), a contract to manage the business of working certain patents (e), a contract to act as agents of a company (f) a contract to act as manager of trust properties (g).

The Court will not enforce specific performance of a contract which is made under such circumstances as to give the plaintiff an unfair

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| (c) <i>Johnson v Shrevesbury and Birmingham Ry Co</i> (1853) 3 De G M & G 914, 98 R R 360 | Mac & G 250, 20 L J Ch 401 409 87 R R 87                        |
| (d) <i>Mair v Himalaya Tea Co</i> (1865) L R 1 Eq 411, 147 R R 872                        | (f) <i>Nusserwanjee v Gordon</i> (1882) 6 Bom 266 283           |
| (e) <i>Stocker v Brockelbank</i> (1851) 3   | (g) <i>Ram Charan v Ralhal Das</i> (1914) 41 Cal 19, 19 I C 157 |

S. R. A  
S. 54

advantage over the defendant (s 22), it will therefore also refuse to grant an injunction to prevent the breach of the contract (h)

Where the case is such that the Court will not enforce specific performance of a contract or prevent its breach by an injunction, it will not restrain the party committing the breach from doing that which is only a violation of what is ancillary or incidental to the principal part of the contract. Thus a Court will not, either by decreeing specific performance or by injunction, compel a company to retain its agents in its employ, so it will not restrain the company from appointing a solicitor, though under the terms of the contract between the company and its agents the agents alone have the right to appoint solicitors for the company (i)

**Right to, or enjoyment of, property.**—It is not in every case where the plaintiff's right to property is invaded that a perpetual injunction will be granted. Such injunction may be granted only in the cases mentioned in cls (a) to (e) of the third paragraph. Of these cls (a) to (d) are similar to cls (a) to (d) of s 12, which relate to specific performance

“*Property*”—A trade mark is property for the purposes of this section (j) [see *Explanation* and ill (w)] The right of a *gor* (priest) to conduct his *yajmans* (patrons) to a temple and perform worship there on their behalf and receive remuneration for his services is a right to the enjoyment of property, if the right is invaded, the Court will grant an injunction, the invasion being such that pecuniary compensation would not afford adequate relief (k). A plaintiff holding a *samad* from Government in which he is described as *vicharanakarta* of Tirumalai and Tirupati temples, *vagaira* (and others), the expression “*vagaira*” including some thirty minor temples, may obtain an injunction restraining the defendant, who is a *dharmakarta* of the said two temples and of three minor ones only, from using a seal bearing on it the words “Tirumalai Tirupati *vagaira* devasthanam *dharmakarta*”, though the plaintiff has no property in the word “*vagaira*,” it connotes an exten

(h) *Callangs v Narsi* (1895) 19 Bom 764

(i) (1882) 6 Bom 266, 283 284

(j) *Chaitarpal Sharma v Jagannath Das* (1922) 41 All 608, 67 I C 353

(k) *Kalidas v Parjaram* (1891) 15

Bom 309, *Moro v Inant* (1897) 21 Bom 821, *Beni Madho Jiragwal v Hira Lal* (1921) 43 All 20, 69 I C 673 otherwise

if the presents are not connected with a religious office *Bansi v Kanhaiya* (1921) 43 All 169, 69 I C 659

sion of the defendant's rights as dharmakarta to which he has no title, and it invades, or threatens to invade, the plaintiff's rights in respect of the minor temples of which the defendant claims to be, but is not, dharmakarta (l)

*Easement of light and air*—Where an easement of light and air is disturbed, an injunction will be granted only where the invasion of the right is such that pecuniary compensation would not afford adequate relief (m) Where the disturbance is such as to render the plaintiff's house useless for the business carried on by the plaintiff in the house, the case is one for a perpetual injunction (n)

*Continuing trespass*—Repeated violation of a person's right to property cannot in ordinary cases be adequately met by damages nor can these damages be satisfactorily ascertained In such a case the appropriate remedy is a perpetual injunction (o) (see ill (o)) and lawful possession a sufficient title as against the trespasser (p)

*Co sharers, landlord and tenant, etc*—The Court will grant a perpetual injunction to restrain one of several co sharers from appropriating to himself land in which each of his co sharers has an interest and from building upon it, and if he has proceeded to build upon it, the Court will grant a mandatory injunction under s 55 directing that the building so far as it has proceeded be pulled down (q) But there is no such broad proposition as that one co owner is entitled to an injunction restraining another co owner from exceeding his rights absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction (r) Injunction in the case of co owners is granted where the act complained of amounts to waste of the joint property or to an illegitimate use thereof or to ouster of the plaintiff from possession and enjoyment of

(l) *Sadagopa v Pama Kisore* (1899) 22 Mad 189

(m) *Dhunjibhoy v Lasbo* (1889) 13 Bom 232, *Sultan Naur Jung v Futomji Ananabho* (1896) 20 Bom 704, *Ghanasham v Moroba* (1894) 18 Bom 474 See also *Paul v Fobson* (1914) L. P. 41 I A 180, 42 Cal 46, 24 I C 300 *Mahomed Ismail Ismail v Jaganath Jannadas* 3 Rang 230, 80 I C 800, A I R 1925 Rang 37

(n) *Iaro v Sana Ullah* (1897) 19 All 259

(o) *Apoji v Apa* (1902) 26 Bom 735

(p) *Ulam v Tabu* (1929) 113 I C 460

(q) *Shadi v Anup Singh* (1890) 12 All 436 [F B] See also *Shamnupper Jute Factory Co v Pam Narain* (1866) 14 Cal 180 198-199

(r) *Shamnupper Jute Factory Co v Pam Narain* (1866) 14 Cal 180, 200-201

S. R. A.  
S. 54.

the property (s) The closing of the door of a staircase which affords access to the roof (t), or of a door which affords the only access to the portion in the plaintiff's occupation (u), is an act amounting to an ouster, and it may be prevented by a perpetual injunction But the mere fact that a tank has been excavated by the defendant on a portion of the joint land, and that a part thereof was fit for cultivation, does not constitute such an injury as would justify an order directing the defendant to refill the tank (v).

It is a settled rule of law that no tenant, whether he has an occupancy right or not, is at liberty to erect houses upon agricultural holdings for other than agricultural purposes and thereby to alter the character of the holding If he does erect a house for other than agricultural purposes, the Court will grant an injunction restraining him from altering the character of the land, and it will also grant a mandatory injunction under s 55 directing him to remove the building (w) Where land has been let out for agricultural purposes generally, the erection of an indigo factory on any part of such land renders it unfit for the purposes of the tenancy, and the landlord may obtain a perpetual injunction restraining the tenant from erecting the factory (x), see ill (k)

*Nuisance* —As regards nuisance, where it is of the kind to injure the health or seriously imperil the life of those complaining of it, the Court will not hesitate to prevent it by way of injunction But where it goes no further than to diminish the comforts of human life, there will always be a question whether the Court will proceed against him who causes that nuisance by injunction or compensate the sufferer in damages (y) See ills (s) and (t), p 873, above, and the case of *Jawan Singh v Muhammad Din* (z) An injunction cannot be granted to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance [s 56, cl (g), p 884, below] The Court will not grant an injunction in a mere *quia timet* action, where

(s) *Anant v Gopal* (1895) 19 Bom 269,  
270

(t) *Soshi Bhusan v Gonesh Chunder*  
(1902) 29 Cal 500

(u) *Anant v Gopal* (1895) 19 Bom 269

(v) *Joy Chunder v Bipro Churn* (1887)  
14 Cal 270, following (1887) 14 Cal 189,  
*supra*

(w) *Ramanadhan v. Zamindar of Lam*

*nad* (1893) 16 Mad 407

(z) *Surendra Narain v Hari Mohan*  
(1904) 31 Cal 174

(y) *Bhicaaji v Pirojshah* (1910) 40  
Bom 401, 33 I C 192 *The Land*  
*Mortgage Bank of India v Ahmedbhai*  
*Habibbhai* (1884) 8 Bom 75, 91-92

(z) (1920) 1 Lah 140, 51 I C 722

there is no proof of injury having occurred and no well founded and reasonable apprehension of injury in the near future, but merely an apprehension which may or may not be well founded (a)

*Breach of Trust*—See ill<sup>s</sup> (b) to (h), p 872, above As to definition of "trust," see s 3 above

*Waste*—See ill<sup>s</sup> (l), (m), and (n), p 873, above

*Potent, copy right and trade mark*—See ill<sup>s</sup> (l), (v) and (w) to this section p 873, above, and ill to (g) s 55, next page

"Invades or threatens to invade"—An injunction may be sued for to restrain a defendant from doing an act which threatens injury to the plaintiff's property, although no such injury has actually ensued. It must, however, be shown that injury will be the inevitable result, it will not do to say that injury may be the result (b) see ill (r) See notes above, 'Nuisance'

**Multiplicity of judicial proceedings**—Clause (e) has reference to cases where, unless an injunction was granted the plaintiff would have to bring repeated suits or to make repeated applications or to take repeated proceedings for the purpose of establishing or safeguarding his rights or of preventing the acquisition of rights by the defendant (c) For instances of this class see ill<sup>s</sup> (p) and (q) p 873 above Neither the text nor the illustrations warrant the supposition that any general jurisdiction for one judicial authority to restrain the proceedings of another is hereby created In particular a civil Court will not grant a permanent injunction to stay apparently regular proceedings in criminal matters (d)

**Damages for future injury**—It is held in England though not unanimously, that the Court has no jurisdiction to award damages by way of compensation for an injury not yet committed but only threatened and intended, but the decision turns on the construction of a special statutory power, so that the reasons are not applicable in India (e)

(a) *Fletcher v Bealey* (1885) 28 Ch D 688

(b) *Pattison v Gilford* (1874) L R 18 Eq 259 *Bindu v Jahnabi* (1897) 24 Cal 260

(c) *Karnadhar v Hariprasad* (1910) 37 Cal 731 734, 6 I C 444, *Apaji v Apa* (1902) 26 Bom 735 739 (repeated trespass), *The Land Mortgage Bank of*

*India v Ahmedbhoj Habibhoj* (1884) 8 Bom 35 91 92 [nuisance]

(d) *Calcutta Port Commrs v Suraj Mull Jalan* 55 Cal 978, 112 I C 712, A I R 1928 Cal 464

(e) *Slack v Leeds Industrial Co operative Society* [1923] 1 Ch 431 C A (dis Younger L J)

S. R. A.  
S. 55.

**55.** When to prevent the breach of an obligation (*f*), it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts

Mandatory  
injunctions

#### Illustrations

(a) A by new buildings obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act (*g*) Part IV B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights

(b) A builds a house with eaves projecting over B's land B may sue for an injunction to pull down so much of the eaves as so project

(c) In the case put as illustration (i) to section 54, the Court may also order all written communications made by B, as patient, to A, as medical adviser, to be destroyed

(d) In the case put as illustration (y) to section 54, the Court may also order A's letters to be destroyed

(e) A threatens to publish statements concerning B which would be punishable under Chapter XXI of the Indian Penal Code (*h*) The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property

(f) A, being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life B may obtain an injunction to restrain the publication

(g) In the cases put as illustrations (v) and (w) to section 54 and as illustrations (e) and (f) to this section the Court may also order the copies produced by piracy, and the trade marks, statements and communications, therein respectively mentioned, to be given up or destroyed

**Mandatory injunction.**—In *Smith v Smith* (1) Sir G Jessel MR said “As to mandatory injunctions, their history is a curious one, and may account for some of the expressions used by the Judges in some of the cases cited At one time it was supposed that the Court would not issue mandatory injunctions at all At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance The

(*f*) These words do not authorise the Court to review the decisions of a domestic jurisdiction, such as the regulations and examination lists of a university, made within its competence and in good faith *Ran Ugrah Singh v Benares Hindu University* 47 All 434, 86 I C 695, A I R 1925 All 253

(question of retrospective regulations the Court found that there had been an irregularity, but it was cured by the Visitor's discretion)

(*g*) Act IX of 1903

(*h*) Act XLV of 1860

(1) (1875) 1 P 20 Eq 500 501

Court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution, and I do not know what is meant by extraordinary caution. Every judge ought to exercise care, and it is not more needed in one case than in another.

"In looking at the reason of the thing there is not any pretence for such a distinction as was supposed to exist between this and other forms of injunction. If a man is gradually fouling a stream with sewage the Court never has any hesitation in enjoining him. What difference could it make if instead of fouling it day by day he stopped it altogether? In granting a mandatory injunction, the Court did not mean that the man injured could not be compensated by damages, but that the case was one in which it was difficult to assess damages, and in which, if it were not granted the defendant would be allowed practically to deprive the plaintiff of the enjoyment of his property if he would give him a price for it. Where, therefore, money could not adequately restate the person injured, the Court said, as in cases of specific performance, 'We will put you in the same position as before the injury was done.' When once the principle was established, why should it make any difference that the wrong doer had done the wrong, or practically done it, before the bill was filed? It could make no difference where the plaintiff's right remained and had not been lost by delay or acquiescence."

The granting of a mandatory injunction is a matter in the judicial discretion of the Court (j). It is granted generally upon the same principles and subject to the same conditions as a perpetual injunction (k). When a mandatory injunction is granted under this section, two elements have to be taken into consideration: in the first place, the Court has to determine what acts are necessary in order to prevent a breach of the obligation; in the second place, the requisite acts must be such as the Court is capable of enforcing (l). These acts may assume a variety of forms, e.g., the pulling down of a building as in ill (a), the pulling down of eaves as in ill (b), the destruction of written communications and letters as in ills (c) and (d), and destruction of copies

(j) *Shamnugger Jule Factory v Ram* 500

*Narain* (1886) 14 Cal 189, 199-201

(l) *Lakshmi v Tara* (1904) 31 Cal

(k) *Smith v Smith* (1875) L R 20 Eq 944 949

S. R. A.  
S. 55

produced by piracy of copyright and of trade marks improperly used by the defendant as in *ills* (v) and (w) of s 54, p 873, above, and *ill* (g) of this section, p 880, above, the removal of trees on the defendant's land the roots whereof, if the trees be allowed to grow, would inevitably damage the plaintiff's building (m), the removal of overhanging branches (n), the demolition of a wall constructed by the defendant on land belonging to the plaintiff (o) An injunction will not be granted directing a person to do repairs, the reason being that the Court will not superintend works of building or of repair (p), but the Court may order the execution of specific work required for the remedy of a nuisance or the like (q) The Rangoon High Court refused to grant a mandatory injunction, at the suit of the owner of the land on which a tomb of the ex King of Delhi was lawfully situated, to compel a member of the family who had erected a kind of shrine over the tomb to remove it (r)

May be granted although act completed —There is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before the action is commenced A mandatory injunction may be granted even after the injury has been completed, provided the plaintiff has not lost his right to relief by delay or acquiescence (s) As regards mandatory injunctions after the act sought to be restrained has been completed, a distinction is drawn between cases of trespass (*e g*, laying pipes in the plaintiff's land) on the one hand and cases of ancient lights on the other In cases of trespass, the fact that the damage suffered by the plaintiff is small is immaterial In cases of ancient lights the quantum of damage to the plaintiff, as compared with the quantum of loss to the defendant

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| (m) (1904) 31 Cal 944, <i>supra</i>            | 1928 Rang 268, chiefly because definite              |
| (n) <i>Vishnu Jagannath v Vasudeo Rag</i>      | substantial damage to the plaintiff did              |
| <i>hunath</i> (1919) 43 Bom 164, 47 I C 629    | not appear   |
| (o) <i>Abdul Hossain v Ram Charan Law</i>      | (s) <i>Smith v Smith</i> (1875) L R 20 Eq            |
| (1911) 38 Cal 657, 12 I C 459 This             | 500 [ancient lights], <i>Durrell v Pritchard</i>     |
| appears to have been overlooked in <i>Ewin</i> | (1860) L R 1 Ch 244 [ancient lights]                 |
| <i>Shank Wa v U Po Nyun</i> , 5 Rang 404,      | <i>Lady Stanley of Alderley v Earl of Shrewsbury</i> |
| 104 I C 139 A I R 1927 Rang 257                | (1876) L R 19 Eq 616 [ancient                        |
| (p) <i>Attorney General v Staffordshire</i>    | lights] <i>Greenwood v Hornsey</i> (1898) 3          |
| <i>County Council</i> [1905] 1 Ch 336, 342     | Ch D 471, <i>Krech v Furrell</i> (1877) 7 Ch         |
| (q) <i>Kennard v Cory Bros</i> [1922] 2 Ch     | D 551 (1879) 11 Ch D 146 [obstruction                |
| 1, C A   | to right of way], <i>Jamnadai v Atmaram</i>          |
| (r) <i>Dawson v Rounac Zamani Begum</i>        | (1878) 2 Bom 133, 137-139                            |
| 4 Rang 476 112 I C 471 A I R                   |  |

is a material consideration (t). Where there is a covenant not to build, and there is a breach of the covenant, the covenantee is entitled to an injunction without the necessity of showing damage (u), the excuse of ignorance being clearly not available. Generally in cases of this class it is material whether the defendant's encroachment was or was not wilful (v).

**Delay and acquiescence.**—Delay and acquiescence may deprive a plaintiff of his right to relief by way of mandatory injunction (w). "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence" (x). Mere omission to take any legal proceedings for a time is not in itself an encouragement to the defendant amounting to an equitable bar to relief (y). The result of authorities on the subject is that where a person had a legal right, it could be destroyed by his acquiescence, that is, if he stood by and allowed his neighbours to incur expenditure in doing what he knew would injure his property. One point for consideration, however, has always been whether the man who did the act knew that he would do the injury (z). If he did know, and must have known, that he was going to do a wrong, it deprives him of one ground of defence (a). It is also to be remembered, where acquiescence is alleged, that where a man has a right to do a thing, and appears to be doing what he has a right to do, you must not assume that he is going to use his right for an unlawful

(t) *Goodson v Richardson* (1874) L R 9 Ch 221, 224, 225 [trespass], *Marriott v East Grinstead Gas & Water Co* [1909] 1 Ch 70, 79 [trespass], *Smulh v Smulh* (1875) L R 20 Eq 500, 505 [ancient lights], *Senior v Pauson* (1866) L R 3 Eq 330, 336 [ancient lights]

(u) *Lord Manners v. Johnson* (1875) 1 Ch. D. 673 [covenant not to erect building] *Sharp v. Harrison* [1922] 1 Ch. 502, seems to disregard this and other like authorities.

(v) *Lalji v. Vishvanath*, 31 B L R 126; 116 I C 234, A I R 1929 Bom 137.

(w) *Smulh v. Smulh* (1875) L R. 20 Eq

500, 503 [ancient lights], *Jamnadas v Atmaram* (1878) 2 Bom 133, 137-139 [ancient lights], *Haji Abdul Allarakhas v Haji Abdul Bacha* (1882) 6 Bom 5, 7

(z) *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117, 123, 78 R R 47, 51 [equitable waste], *Abdul Hossain v Ram Charan Lait* (1911) 38 Cal 687, 692-693 [trespass]

(y) *Hogg v Scott* (1874) L R 18 Eq 444, 454 [copyright], *Jamnadas v. Atmaram* (1878) 2 Bom. 133, 137-139

(z) *Smulh v Smulh* (1875) L R. 20 Eq 500, 503

(a) *Ib.*, p 503

S. R. A. purpose (b) See also notes to s 22 under the head "Delay," p 797,  
 Ss. 55, 56. above

**Mandatory injunction against co-sharers and tenants**—See notes to s 54 under the head "Right to or enjoyment of property," sub head "Co sharers, landlord and tenant, etc," p 877, above

Injunction when  
 refused

- 56.** An injunction cannot be granted—
- (a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless restraint is necessary to prevent a multiplicity of proceedings,
  - (b) to stay proceedings in a Court not subordinate to that from which the injunction is sought,
  - (c) to restrain persons from applying to any legislative body,
  - (d) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government,
  - (e) to stay proceedings in any criminal matter
  - (f) to prevent the breach of a contract, the performance of which would not be specifically enforced,
  - (g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance,
  - (h) to prevent a continuing breach in which the applicant has acquiesced,
  - (i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust (c),
  - (j) when the conduct of the applicant or his agents

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(b) *Attorney General v Leeds Corporation* 6 Lah 381, S C nom *Laccha Mal v*  
*tion* (1870) L R 5 Ch 583, 591 [nuisance] H N, 87 I C 931, A I R 1923 Lah  
 (c) *Sardars Mal v Hirde Nath* (1923) 459

has been such as to disentitle him to the assistance of the Court,

(h) where the applicant has no personal interest in the matter

*Illustrations*

(a) A seeks an injunction to restrain his partner B from receiving the partnership debts and effects. It appears that A had improperly possessed himself of the books of the firm and refused B access to them. The Court will refuse the injunction.

(b) A manufactures and sells crucibles designating them as patent plumbago crucibles though in fact they have never been patented. B pirates the designation. A cannot obtain an injunction to restrain the piracy.

(c) A sells an article called 'Mexican Balm' stating that it is compounded of divers rare essences and has sovereign medicinal qualities. B commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying A's Mexican Balm. A sues B for an injunction to restrain the sale. B shows that A's Mexican Balm consists of nothing but scented hog's lard. A's use of his description is not an honest one and he cannot obtain an injunction.

[See *Perry v Truefitt* (1842) 6 Bear 66 63 R R 11 the facts as stated here are stronger against the plaintiff (d) ]

**Scope of the section**—This section gives a list of cases in which a perpetual injunction cannot be granted. It must however be remembered that the jurisdiction to grant injunctions is discretionary, and an injunction, therefore, may be refused even if the case be one not covered by the present section.

**Clause (b) Stay of proceedings**—It is laid down in clause (b) that no injunction *to stay proceedings* can be granted unless the Court in which the proceedings are to be stayed is subordinate to that in which the injunction is sought. In a case which arose before the passing of the present Act it was held by a Full Bench of the Calcutta High Court that an injunction may be issued *against a decree holder* to restrain him from executing a decree, though the Court granting the injunction and the Court passing the decree are Courts of co-ordinate jurisdiction. Such an order, it was said, is only binding on the decree holder per

(d) One might think *Pidding v How* (1837) 8 Sim 477, 42 R R 231 would have furnished an illustration making the point more clear and better suited for exportation to India. There the plaintiff had represented the blend of tea for which he claimed an exclusive trade name as being specially imported from

China whereas in fact it was a mixture of teas purchased in England. Injunction refused with liberty to bring an action at law (the Court of Chancery then and for many years later could not award damages as explained above in the Introduction to the Specific Relief Act)

S. R. A  
S. 56.

sonally (e) See Mulla's Code of Civil Procedure, notes to O 39, r 1, "Powers of High Court to stay the hearing of a suit"

In a Madras case the question arose whether an injunction to restrain a decree holder from executing his decree was an injunction "to stay proceedings" within the meaning of this clause It was held that it was not, the reason given being that as no application had yet been made for execution, and as none could be made so long as the injunction was in force, there was no pending proceeding that was stayed by the injunction (f) But this view has been dissented from by the High Court of Calcutta (g), and it is not in accord with later Madras decisions (h) There does not seem to be any good reason why the expression "proceedings" in this clause should be confined to proceedings pending in a Court, and why it should not apply to proceedings intended or threatened to be taken by a party Contrast cl (3) of the section

The rule laid down in cl (b) does not apply to temporary injunctions which are governed by O 39 of the Code of Civil Procedure (i)

Clause (f) Injunction to prevent breach of contract —See notes to s 54 under the head "Injunction to prevent breach of contract," p 875, above

Clause (g) Nuisance —See notes to s 54 under the head "Right to, or enjoyment of, property," sub head "Nuisance," p 878, above

Clause (h) Acquiescence —See notes to s 22 under the head "Delay," p 797, above, and notes to s 55 under the head "Delay and acquiescence, p 883, above"

Clause (i) Equally efficacious relief —An injunction will not be granted to restrain an arbitration proceeding on the ground that the plaintiff did not agree to the reference (j)

Clause (j) Plaintiff's conduct —An injunction cannot be granted where the plaintiff's conduct is such as to disentitle him to that relief (k) The illustrations to the section relate to this clause

|  |  |
|--|--|
| (e) <i>Dhuronidhur v Agra Bank</i> (1880) 5 Cal 86, on review from (1879) 4 Cal 380, 396 | Mad. 338 341-342, <i>Sethurayar v Shan mugam</i> (1892) 21 Mad 353         |
| (f) <i>Appu v Raman</i> (1891) 14 Mad 425, 429-430                                       | (i) <i>Amir Dulhin v Adm Gen of Bengal</i> (1890) 23 Cal 351               |
| (g) <i>Karnadhar v Hariprasad</i> (1910) 37 Cal 731, 734, 61 C 414                       | (j) <i>Ram Kissen Joydoyal v Ioorun Mall</i> (1920) 47 Cal 733, 56 I C 571 |
| (h) <i>Vankatesa v Ramasami</i> (1892) 15  | (k) <i>Steni Chettiar v Santhanathan</i> (1897) 20 Mad 28, 57              |

Clause (k): Personal interest.—Every taxpayer is directly interested in the proper application of municipal funds. Any taxpayer may therefore sue the municipality for an injunction restraining the municipality from misapplying its funds (l)

57. Notwithstanding section 56, clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement provided that the applicant has not failed to perform the contract so far as it is binding on him

*Illustrations*

(a) A contracts to sell to B for Rs. 1,000 the good will of a certain business unconnected with business premises, and further agrees not to carry on that business in Calcutta. B pays A the Rs. 1,000, but A carries on the business in Calcutta. The Court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta.

(b) A contracts to sell to B the good will of a business. A then sets up a similar business close by B's shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and B may obtain an injunction to restrain A from soliciting the customers, and from doing any act whereby their good will may be withdrawn from B.

(c) A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.

[*Lumley v Wagner* (1852) 1 D M & G 604, 91 R R 193]

(d) B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk.

[Recent English authorities have distinctly refused to go so far, an affirmative agreement does not of itself imply for this purpose a negative agreement to do nothing inconsistent with it. *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416, 426, 432. Whether an express agreement is affirmative or negative is a matter of substance and not of verbal form. *Metropolitan Electric Supply Co v Ginder* [1901] 2 Ch 799, but there must be a distinct negative stipulation. *Mortimer v Beckett* [1920] 1 Ch 571. We do not see how *H Rubenstein & Co v Gailoud* (1930) 122 I C 231, can be reconciled with the present illustration.]

S. R. A.  
S. 57.

(e) A contracts with B that in consideration of Rs 1 000 to be paid to him by B on a day fixed he will not set up a certain business within a specified distance B fails to pay the money A cannot be restrained from carrying on the business within the specified distance [But s 27 of the Contract Act seems to make the agreement wholly void]

**Injunction to perform negative agreement**—It is provided by s 54 that in granting an injunction to prevent the breach of a contract the Court is to be guided by the rules contained in Chapter II relating to specific performance By s 56, cl (f), it is enacted, that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced The present section provides that notwithstanding s 56, cl (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement Thus the contract in *ills (c) and (d)* is one of personal service, and therefore not capable by s 21 cl (b), of specific performance, yet the Court may by an injunction restrain the singer from singing at any other place of public entertainment and the clerk from serving a rival house Similarly, where A agrees to sell B all the mica produced from his mines during a specified period and not to sell it to any other person though the Court cannot compel A to sell the mica to B [s 21, cl (a)] it may restrain A by an injunction from selling the mica to any other person (m) On the same principle if A agrees to serve B for a period exceeding three years, and not to serve any other person during that period, though B cannot obtain specific performance of the contract [s 21, cl (g)] he may obtain an injunction restraining B from serving elsewhere (n) But the Court is not bound to grant the injunction The granting of an injunction under this section is discretionary Thus where the defendant agreed to serve the plaintiff as a cutter for a period of ten years, and not to serve as a cutter elsewhere during that period, the Court refused to restrain the defendant by an injunction from serving as a cutter elsewhere, it being proved that the circumstances under which the contract

(m) *Subba Varlu v Haji Badsha Sahib*  
(1903) 26 Mad 159

14 Mad 18, *Burn & Co v McDonald*  
(1909) 30 Cal 354

(n) *Madras Railway Co v East* (1891)

was entered into were such as to give the plaintiff an unfair advantage over the defendant within the meaning of branch I of s 22 (o)

Ill (c) is a reproduction of the decision in *Lumley v Wagner* (p) But it does not follow therefore that the operation of the section is confined to cases like *Lumley v Wagner*, that is, cases of contracts which are dependent on the personal qualifications or volition of the parties referred to in s 21, cl (b) This is borne out by the wide language of the section and by the other illustrations to the section (q)

**Negative agreement may be implied**—The negative agreement need not be express, as in *Lumley v Wagner* (p) It may be implied, as in ills (b) and (d) Ill (d) shows that it may be implied even in the case of a contract of personal service, which, indeed, has the effect of enforcing indirectly a contract of personal service Where the defendant agreed diligently and to the best of his ability to devote himself to the duties incumbent on him as a draftsman and general assistant to the plaintiffs for a period of five years, it was held that though there was no negative condition in terms in the contract, a negative covenant could properly be implied under this section and ill (d), and the defendant was restrained by an injunction from serving any other person during that period (r) See notes to s 27 of the Contract Act under the head "Restraint during term of service," p 212, above These provisions of the Act go beyond the English law as now understood See above on pp 868-870, and note following ill (d) to this section

**Proviso to the section.**—A plaintiff who has failed to perform his part of the contract is not entitled to the benefit of this section (s), see ill (c)

**Liquidation of damages not a bar to an injunction under this section.**—It is provided by s 20 that a contract may be specifically enforced, though a sum be named in it as the amount to be paid in case of its

(o) *Callanji v Varsi* (1835) 19 Bom 764, affg (1834) 18 Bom 702

(p) (1852) 1 D M G 604, 91 R R 93

(q) *Subba Naidu v Haji Badsha Sahib* (1903) 26 Mad 165, 171-173

(r) *Burn & Co v McDonald* (1909)

36 Cal 354 See also *Charlencorth v MacDonald* (1895) 23 Bom 103, a case from Zanzibar, where the Specific Relief Act is not in force

(s) *Subba Naidu v Haji Badsha Sahib* (1903) 26 Mad 165, 173

S. R. A. breach, and the party in default is willing to pay the same. The same  
S. 57. principle applies to injunctions (t).

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SCHEDULE.

ENACTMENT REPEALED.

*Repealed by Act XII of 1891.*

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(t) *Madras Railway Co. v Rust* (1891) 14 Mad 18, 22

# INDEX.

*References to Specific Relief Act are in thick black type.*

## ACCEPTANCE,

- absolute and unqualified, must be, 49
- after revocation, arriving, 40
- apparent, 54, 58
- by acting on offer, 57-58
- by estoppel, 51-52
- by performance of conditions, 55
- by post, 37, 38, 54, n
- by receipt of consideration, 55-61
- cannot be assumed, 55
- communication of, 58
- condition precedent to, 48
- conditional, 49-54
- letter of, misdirection of, 39
- manner or mode of, 54
- must be by person to whom offer is made, 88
- must be within reasonable time, 45, 47
- of proposal, 15, 30, 33
- of reward for information, 44, 56
- of tender, contract by, 43, 44
- presumption of, 55
- revocation of, 40, 41 *seq*
- revocation arriving before, 40
- transmission of, by post, 36-40

ACCOUNT CURRENT, appropriation of payments in case of, 346

## ACCOUNTS,

- agent's, 604
- partnership, 725, 729

ACQUIESCENCE, as bar to relief on ground of undue influence, 113-114

*And see HOLDING OUT*

ACT OF STATE, ratification of, ousts jurisdiction of Courts, 583

ACTION cannot be brought upon mutual dealings by and against firms with common partner, 726

## ADMINISTRATION BOND,

- liability of sureties under, not dependent on validity of grant, 472
- not void though grant obtained by fraud, 137

## ADOPTION,

- agreement to give annual allowance in consideration of, 159
- under coercion, void, 94

S. R. A. breach, and the party in default is willing to pay the same. The same  
S. 57. principle applies to injunctions (t).

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# INDEX.

*References to Specific Relief Act are in thick black type.*

## ACCEPTANCE,

- absolute and unqualified, must be, 40
- after revocation, arriving, 40
- apparent, 54, 58
- by acting on offer, 57-58
- by estoppel, 51-52
- by performance of conditions, 55
- by post, 37, 38, 54, n
- by receipt of consideration, 55-61
- cannot be assumed, 55
- communication of, 58
- condition precedent to, 48
- conditional, 49-54
- letter of, misdirection of, 39
- manner or mode of, 54
- must be by person to whom offer is made, 89
- must be within reasonable time, 45, 47
- of proposal, 15, 30, 33
- of reward for information, 44, 56
- of tender, contract by, 43, 44
- presumption of, 55
- revocation of, 40, 41 *seq*
- revocation arriving before, 40
- transmission of, by post, 36-40

ACCOUNT CURRENT, appropriation of payments in case of 346

## ACCOUNTS,

- agent's, 604
- partnership, 725, 729

ACQUIESCENCE, as bar to relief on ground of undue influence, 113-114

*And see HOLDING OUT*

ACT OF STATE, ratification of, ousts jurisdiction of Courts, 583

ACTION cannot be brought upon mutual dealings by and against firms with common partner, 726

## ADMINISTRATION BOND,

- liability of sureties under, not dependent on validity of grant, 472
- not void though grant obtained by fraud, 137

## ADOPTION,

- agreement to give annual allowance in consideration of, 159
- under coercion, void, 94

## ADVERTISEMENT,

- contract by, 57-58
- for tenders, effect of, 57.
- of price, whether an offer, 14, 15

AGENT *See* PRINCIPAL AND AGENT

## AGREEMENT,

- alteration of, unauthorised, 353 *seq*
- ambiguous avoidance for uncertainty, 84, 228, 229
- amounting to trading with enemy, 167
- by client to remunerate his pleader's clerk, 185
- collateral to wagering contract, 240
- consideration for, unlawful, 144 *seq*, 164-167 *seq*, 184
- contingent on impossible events, void, 259
- defined, 13
- distinguished from contract, 32
- entire or divisible agreements, 186-190
- for promotion of litigation in which one has no personal interest, 175 *seq*
- for stifling prosecution, 169
- fraudulent, 148
- in restraint of legal proceedings, 220-228
- in restraint of marriage, 209
- in restraint of trade, 209 *seq*
- independent promises to perform lawful and unlawful acts, 340
- interfering with Courts of justice, 179-180
- not to bid against one another at auction sale, 185
- public policy, against, 148, 149, 167
- tending to create interest against duty, 183
- tending to create monopoly, 185
- to assign or sublet excise licence, 152, 153
  - distinguished from agreement to sublet public contract 154
- to do impossible act, 326, 327
- to procure marriages for reward, 180
- to traffic in sale of public offices, 184
- void, 13, 144, 156, 186, 209, 340 *seq*
  - advantage received under, must be restored, 371
  - contingent on impossible events, 259
  - distinguished from illegal, 156
  - liability of promisor on quasi contract, 398, n
  - made abroad, not enforceable, though valid by *lex loci*, 219
  - when party disables himself from suing, 375
  - where consideration in part unlawful, 186, 187
- voidable, joint Hindu family property, sale of, 371.
- when a contract, 64

## ALIEN ENFMILES, contract with, 167, 335

## ALTERATION of contract, 351

- of documents, 353 *seq*

## AMBIGUITY, agreements void for, 228-229.

VAULTY, receipt of, out of profits, does not constitute partnership, 681

#### APPROPRIATION OF PAYMENT,

- application at discretion of creditor where no direction from debtor, 343
- application where neither party appropriates 346
- appropriation as between principal and interest, 345
- evidence of special intention of debtor, 344
- instructions of debtor must be observed, 341
- section applies only where several distinct debts, 342

#### ARBITRATION

- conditions for reference to, not prohibited, as being in restraint of legal proceed-  
ings, 220, 222
- contract to refer to, how far specifically enforced, 792.
- partner cannot bind firm by submission to, 698
- remedies for breach of agreement to refer, 228

#### ASSIGNMENT,

- by operation of law (insolvency), 267, 268
- of contract, 263
- of debts and actionable claims, 353
- novation, 347
- with intent to defeat creditors, 163

#### ATTORNEY *See* SOLICITOR

#### AUCTION,

- auctioneer, agent of vendor, 42
  - authority to sign contract on behalf of both buyer and seller, 570, 574
    - but he cannot delegate his authority, 570, 574, 575
    - to take bill of exchange for deposit 570
    - to take cheque, 570
  - cannot rescind contract of sale, 570
    - or warrant goods sold, 570
  - does not contract with intending bidders that goods shall be offered for sale,  
57
  - no implied authority to sell by private contract, 570
  - not liable for accepting bid below given price where sale without reserve, 598
- bid, acceptance of, *kutcha pucca* 42
  - withdrawal of, 42
- effect of advertising sale as without reserve 56
- goods of third party in hands of auctioneer privileged from distress, 664
- misdescription of parcels in sale under Court, relief against, 402
- statements by auctioneer in sales by Court, reliance on, 130, n

#### AWARDS,

- may be specifically enforced, 822.
- suit to enforce terms of, whether suit for specific performance, 823.
- within what time such a suit must be brought, 823.

#### BAILMENT,

- agent for payment is not a bailee, 512, 513
- a technical term of the common law, 511
- care required by bailee, standard of, 516, 524

## ADVERTISEMENT,

- contract by, 57-58.
- for tenders, effect of, 57
- of price, whether an offer, 14, 15

AGENT *See* PRINCIPAL AND AGENT

## AGREEMENT,

- alteration of, unauthorised, 353 *seq*
- ambiguous avoidance for uncertainty, 84, 228, 229
- amounting to trading with enemy, 167
- by client to remunerate his pleader's clerk, 185
- collateral to wagering contract, 240
- consideration for, unlawful, 141 *seq*, 164-167 *seq*, 184
- contingent on impossible events, void, 259
- defined, 13
- distinguished from contract, 32
- entire or divisible agreements, 186-190
- for promotion of litigation in which one has no personal interest, 175 *seq*
- for stifling prosecution, 169
- fraudulent, 148
- in restraint of legal proceedings, 220-228
- in restraint of marriage, 209
- in restraint of trade, 209 *seq*
- independent promises to perform lawful and unlawful acts*, 340
- interfering with Courts of justice, 179 180
- not to bid against one another at auction sale, 185
- public policy, against, 148, 149, 167
- tending to create interest against duty, 183
- tending to create monopoly, 185
- to assign or sublet excise licence, 152, 153
  - distinguished from agreement to sublet public contract 154
- to do impossible act, 326, 327
- to procure marriages for reward, 180
- to traffic in sale of public offices, 184
- void, 13, 144, 156, 186, 209, 340 *seq*
  - advantage received under, must be restored, 371
  - contingent on impossible events, 259
  - distinguished from illegal, 156
  - liability of promisor on quasi contract, 398, n
  - made abroad, not enforceable, though valid by *lex loci*, 219
  - when party disables himself from suing, 375
  - where consideration in part unlawful, 186, 187
- voidable, joint Hindu family property, sale of, 371.
- when a contract, 64

## ALIEN ENFMIES, contract with, 167, 335

## ALTERATION of contract, 351

- of documents, 353 *seq*

## AMBIGUITY, agreements void for, 228-229.

ANNUITY, receipt of, out of profits, does not constitute partnership, 681

#### APPROPRIATION OF PAYMENT,

- application at direction of creditor where no direction from debtor, 343
- application where neither party appropriates, 346
- appropriation as between principal and interest, 345
- evidence of special intention of debtor, 344
- instructions of debtor must be observed, 341.
- section applies only where several distinct debts, 342

#### ARBITRATION

- conditions for reference to, not prohibited, as being in restraint of legal proceedings, 220, 222
- contract to refer to, how far specifically enforced, 792.
- partner cannot bind firm by submission to, 698
- remedies for breach of agreement to refer, 228

#### ASSIGNMENT,

- by operation of law (insolvency), 267, 268
- of contract, 263
- of debts and actionable claims, 353
- novation, 347
- with intent to defeat creditors, 163

ATTORNEY. *See* SOLICITOR

#### AUCTION,

- auctioneer, agent of vendor, 42
  - authority to sign contract on behalf of both buyer and seller, 570, 574
    - but he cannot delegate his authority, 570, 574, 575
    - to take bill of exchange for deposit, 570
    - to take cheque, 570
- cannot rescind contract of sale 570
  - or warrant goods sold, 570
- does not contract with intending bidders that goods shall be offered for sale, 57
- no implied authority to sell by private contract, 570
- not liable for accepting bid below given price, where sale without reserve, 598
- bid, acceptance of, *kutcha pucca* 12
  - withdrawal of, 42
- effect of advertising sale as without reserve 56
- goods of third party in hands of auctioneer privileged from distress 664
- misdescription of parcels in sale under Court, relief against, 402
- statements by auctioneer in sales by Court, reliance on, 130, n

#### AWARDS,

- may be specifically enforced, 822.
- suit to enforce terms of, whether suit for specific performance, 823.
  - within what time such a suit must be brought, 823.

#### BAILMENT,

- agent for payment is not a bailee, 512, 513
- a technical term of the common law, 511
- care required by bailee, standard of, 516, 524

BAILMENT—*continued*

- carrier, common law liability of, whether affected by Contract Act 516, 517
- common law rule as to, 512, 517, 543
- death of bailor or bailee terminates gratuitous bailment, 531
- definition of, 510, 517 *seq*
- delivery to bailee, 513
- deposit of money with banker is not, 513
- distinguished from sale or exchange*, 512
- duty to disclose faults in goods bailed, 514
- estoppel of bailee, 533
- expenses of gratuitous bailee, liability of bailor for, 529
- finder of goods, right to reward 535
  - right to sell, 535, 536
- for hire article not fit for intended purpose, 514, 530
- gratuitous lender, not liable for secret defects in thing lent, 515
- gratuitous standard of care required by, 516
- gratuitous, terminated by death of bailor or bailee, 531
- guest at inn, position of, analogous to bailee, 520
- liability of bailee for making unauthorised use of goods bailed, 526
- liability of bailee for negligence of servants, 524
- liability of bailor for latent defects, 514
- lien, bailee for reward cannot transfer, to sub contractor without bailor's authority, 537
  - general, of bankers, 537, 538
    - of factors, 537, 539-541
    - of policy brokers, 537
    - of solicitors, 537, 541
    - of wharfingers, 537, 541
  - particular, of bailee, 536
- mixture with bailee's own goods, effect of, 527
- negligence, bailee cannot contract himself out of liability for, 524
- pledges, of, 543
- profit from goods bailed, right of bailor to, in absence of special agreement, 532
- responsibility of bailor to bailee, 532
- return of goods bailed, 530
  - lent gratuitously, 529
  - no bailment unless goods to be returned or accounted for, 512
  - return to bailor without title, 533
  - return to one joint owner, 532
- Roman law, rule of, as to duty of bailor 514 515
  - mixture with bailee's own goods 528
- servant, bailee's liability for negligence of, 524
- suits by bailees or bailors against wrongdoer, 554
- termination of, by wrongful use of goods by bailee, 525
  - by death, 531
- third parties, rights of, 534
- wrongdoer, suit against, for injury to goods bailed, 556
  - apportionment of relief obtained, 557

**BANKER,**

- general lien of, on customer's securities, 537, 538
- does not extend to securities deposited for safe custody, 538
- overdrafts, notice of increase in rate of interest on, 61

**BANK NOTE, alteration of number, material, 354, n****BANKRUPTCY,**

- administration of partnership, assets in 717-719
- of promisor, does not amount to refusal to perform contract, 291
- principal's discharge in, does not discharge surety, 487
- See* **INSOLVENCY**

**BARRISTER,**

- authority to compromise suit, 567, 568
- compromise arranged through mistake of, 136

**BENAMI TRANSACTION, suit by beneficiary, 24****BET *See* **WAGER******BILL OF EXCHANGE,**

- alteration of, material, effect of, 355, 359, 360
- company directors, innocent misrepresentation as to authority to draw, 124 130
- consideration presumed 197
- indorser, discharge of, where remedy against prior party impaired 496
- indorser of, primarily liable as principal on bill, 498
- notice of dishonour, what is reasonable time for, 308
- partner in trading firm, authority to draw in usual course of business, 698
  - authority to settle partnership affairs on dissolution does not authorize acceptance of bill in firm name, 561
- presentment for acceptance or payment what is reasonable time for 308
- signature by agent, 644
- signature of blank paper, implied authority to holder, 87
- And see* **NEGOTIABLE INSTRUMENT PROMISSORY NOTE**

**BOND,**

- alteration of, after execution 355
- by ward 159
- for performance of public duty stipulated penalty, 459
- surety bond under C P C, s 53 (4) discretion of Court as to enforcement 491

**BOOK, author receiving royalty not a partner with publisher 672****BOOKSELLER'S CATALOGUE offers in, 57****BRFACH OF CONTRACT,**

- anticipatory breach ' 287
- consequences of, 405 *seq*
- contract for purchase of land 426
- measure of damages for, 405 *seq*
- stipulated penalties bond for performance of public duty, 453

**BROKER,**

- authority of, 569
- cannot recover commission in respect of warring agreement, 240, 241
- no power to delegate authority, 569
- And see* **PRINCIPAL AND AGENT, POLICY BROKER.**

BURDEN OF PROOF *See* EVIDENCE

## CANCELLATION OF INSTRUMENTS,

conditional on party seeking cancellation and making compensation, 839  
effect of, on registration, 834, 837.

partial, when ordered, 838.

to obtain, reasonable apprehension of serious injury must be proved, 835  
when may be ordered, 834, 835.

where minors concerned, 838.

who may claim, 834.

within what time must suit for, be brought, 837, 838.

## CAPACITY,

to contract, 65 *seq*

follows law of domicile at time contract made, 12

except as to contracts affecting immovable property, 12

*And see* DRUNKENNESS, LUNATIC, MARRIED WOMAN, MINOR

## CARRIER,

carriage of passenger, notice of special conditions on ticket, 34

common law liability of, whether a "usage of trade," 10

whether affected by Contract Act, 516

negligence of burden of proof, 521, 522

railway company, delivery to, what amounts to, 513, 514

liability of, for loss of goods subject to provisions of Act, 519

payment of unauthorised surcharge, 141, *n*

"CATCHING BARGAINS," rule of equity as to, 109

## CHAMPERTY,

agreement by solicitor with client, making remuneration dependent on result of case, void, 179

agreement to supply funds to carry on suit in consideration of share of property not void for, 175

to avoid agreement, it must be against public policy, 175

case law on the subject, 173-179

English rules against, do not apply to India, 174, 175

purchase of subject matter of suit, not unlawful, 176

sale at undervalue of property already given to another is not champertous, 176  
what is, 173

CHARITY promise of subscription to 19

## CHARTERPARTY,

mispresentation in, as to tonnage of ship, 124

rectification of on ground of mistake, 139

CHATTELS, restitution of, 756, 757.

decree for restitution how executed, 757.

## CHI QUE,

alteration, effect of, 360

auctioneer may take in payment of deposit, 570

given in satisfaction of smaller amount cashing does not operate as discharge in full, 364, *n*

**CHEQUE—continued**

obliteration of crossing • protection of persons paying in good faith, 360  
 payment by, at request of creditor, 312.  
 tender of, 276.

**CHIT FUND PLAN,**

not a lottery, 232

**C. I. F. CONTRACT** *See* SALE OF GOODS**COERCION,**

adoption under, void, 91  
 agreement entered into under fear of criminal proceedings, 93.  
 consent excluded by, 91, 125, 126.  
 defined, 92, 403  
 fear, act done under influence of, 102.  
 inadequate consideration as evidence of, 108, 191, 207  
 marriage void for, in England, 91.  
 payment under, 386, 387.  
 when an offence, 93

**COHABITATION**, past, as consideration, 165, 166, 201, 202**CO HEIRS**, suit against joinder of parties, 300**CO TENANTS**, application of s 43 to, 300**COLLATERAL AGREEMENTS** (to void contracts), efficacy of, 240**" COMMANDITE "** partnership, 679**COMMISSION**, agent's *See* PRINCIPAL AND AGENT**COMMON LAW,**

agency, consideration not necessary to create, 560  
 agreements in restraint of legal proceedings, 222, 223  
 bailees, general liability of, 517  
 bailment, as to, 512, 517, 543  
 champerty and maintenance, 173  
 common carrier, liability of, 9, 517  
 compensation for non gratuitous act, 393  
 compounding felony, agreements for, void at, 169  
 consideration, as to, 31, 165, 191, *n*  
     adequacy of, 207  
 contracts prohibited by, 149, 150  
 Courts, Specific Relief how far administered in, 738, 739  
 delivery and acceptance of goods, 308, 310  
 dispensation with performance, 361.  
 duress in, 92  
 estoppel of bailee from denying bailor's title, 533  
 finder of goods, position of, 535  
 foreign law, proof of, 141, 142.  
 formal contracts in, 191, *n*, 198, *n*  
 impossibility of performance by act of party, 318  
 impossibility of performance by destruction of subject matter of contract, 328

COMMON LAW—*continued*

- innkeeper, liability of, at, 520
- interest not payable except by express agreement or trade usage, 431
- introduction of, into India, 2
- liability of bailor for latent defects, 514 515
- limitation of action to set aside contract, 368
- marriage brokerage contracts void by, 180
- minor partner, position of, 687
- minors' contracts at, 65-78
- misrepresentation, 125
- mistake of law, relief for, 140
- mistake, recovery back of money paid under 401
- moral predominance of, in foreign jurisdictions, 6, n
- mutual discharge of obligation on contract, 361
- offer and acceptance, as to, 37-40
- past cohabitation, no consideration in 166 201, 202
  - supposed exceptions to rule 202
- payment, place of, 308
- performance of contract place for 308
- pleading, rules of, 317
- possession, attributed to person in control on his own account 748 749
- promise by married man to marry another on his wife's death void, 165
- promise not necessarily communicated in 15
- public office, sale of, void by, 184
- public policy, as to, 167
- relation to native law of contract, 3
- rescission of contract, lapse of time no bar to 368
- restraint of trade, agreements in, common law presumption as to 215
  - provisions of I C A as to, in advance of, 216
- third party cannot sue on contract by, 20
- time for performance of contract 308
- trade names, use of, 675
- trespass to goods, action by bailor for, 556
- undue influence in 97 *seq*

## COMMUNICATION,

- intention to communicate not equivalent to 34
- of acceptance 58, 59
- of proposal, 33 *seq*
- of special conditions 34
- when complete, 36 *seq*

## COMPANIES, not within partnership clauses of Act, 730

## COMPANY,

- contract with promoters of a, 802.
- directors innocent misrepresentation as to authority to draw bills, 124 130
- error as to identity of 90
- forfeiture of shares for unpaid calls disclaimer of guarantor of calls 46.
- not bound by false certificate of shares issued by secretary, 662

COMPANY—*continued*

order to register applicant's name as shareholder cannot be made under s 45 of S.R.A., 855.

prospectus incorporation of, in life policy, 35

specific performance by and against, 801, 802, 814.

## COMPENSATION,

for misdescription on sales of land, 128-129

general principles as to 767, 768.

power of Court to award, in certain cases of specific performance, 782, 783.

specific performance may be decreed with, 769

when not admissible, 768.

*And see DAMAGES*

## COMPROMISE,

of claim, 29, 102, 193

of criminal proceedings, 169-173

of disputed title not affected by later decision on title, 136 n

of suit agreement under mistake as to subject-matter, 136

implied authority of counsel or solicitor to effect, 567-568

of suit impeaching will, 162

offence against foreign law, 169, 170

## CONCEALMENT,

guarantee obtained by, invalid, 502

what is a "material circumstance," 504

of fact, when material, 131

evidence of materiality of, 131, 132

title, defective, agreement that vendor not liable for, 117, n

## CONDITION,

acceptance, conditional 48

against subletting of contract, breach of, 153

concurrent, 313

condition precedent 255 256, 313

condition subsequent, 255, 256

special, communication of, 34

indorsement of, on tickets 34, 35

inability to read no excuse, 34, n

tenders for public service, 42

"CONDITION PRECEDENT" to acceptance, 48

## CONFLICT OF LAWS,

agreement in restraint of trade made abroad, valid by *lex loci*, not enforceable in India, 219

domail, capacity to contract governed by law of, 12, 65

## CONSENT,

ambiguity in expression of, 84

apparent, given under mistake, 84, 85

coercion, excludes, 92, 125, 126

definition of, 81, 91.

estoppel and, 87

free, what is, 91.

CONSENT—*continued*.

- obtained by fraud, 91, 114, 125.
- statutory, law governing validity of, 40.

## CONSIDERATION,

- absence of, generally avoids agreement, 190 *seq.*
- act must be at desire of promisor, 17.
- adequacy of, 108, 192, 207, 208.
- agency may be created without, 560
- agreement to extend time for performance, not necessary for, 361
- apparent benefit to promisor, not material, 207, 468.
- apparent forbearance, 29.
- apparent, without legal value, 192
- barred judgment debt, promise to pay does not require, 205.
- bill of exchange, presumption in case of, 197.
- common law of, 31, 165.
- compromise of claim as, 29, 192.
- defined, 13, 17.
- duty, legal, performance of, 165, 194-197.
- executed, 30.
- executory, 30.
- failure of, by default of plaintiff, 318, 319.
- failure of, on repudiation of unlawful agreement, recovery of money paid, 368, 369.
- forbearance to sue as, 27-31, 192-194
- forbidden by law, 144, 149.
- good, 31.
- good, abandonment of groundless claim is not, 192, 193.
- gratuitous promises, 192
- guarantee, for, 468
- illegal, 144, 163, 164, 186-190
- immoral*, 164
- inadequacy of, by itself no ground for refusing specific performance, 208, 822.
- inadequate, as evidence of coercion, 108, 191, 207, 208
  - not of itself sufficient ground for rescission, 208.
- lawful and unlawful, 144 *seq.*
- mere motive is not good, 202.
- mutual promises, whether sufficient, 29, 191.
- natural love and affection, 190, 191, 198, 199.
- need not be equal in value to promise exchanged, 192.
- not matter of form, 191.
- past, 25-27, 165, 166, 201, 202
- past cohabitation as, 165, 166, 201, 202.
- presumption of, in case of negotiable instrument, 197.
- promise to pay statute barred debt, 191.
- promise to perform existing duty is not good, 165, 194-197.
- promise to perform subsisting obligation to third person, 194-195.
- public policy, opposed to, unlawful, 144, 148, 149, 167.
- receipt of, acceptance of proposal by, 65, 61.

**CONSIDERATION**—*continued*

- subsequent promise as, 25, 26
- third party, consideration may proceed from, 19 *seq*  
English law otherwise, 19, 20, 21.
- unlawful, 144 *seq*, 164, 167 *seq*, 186  
in part, makes whole agreement void, 186  
otherwise where part of consideration merely not enforceable, 187.  
past cohabitation not, in English law, 201
- "unreal," 31, 192
- valuable, 31, 32
- voluntary services as, 200

**CONSTRUCTIVE CONTRACTS**, and contracts implied by law, 381-405

**CONSTRUCTIVE FRAUD**, what is, 123

**CONTINGENT CONTRACT** *See* **CONTRACT**

**CONTRACT**,

- agreement distinguished from, 32
- agreement, when a, 13, 64
- ambiguous, 228-231
- apparent, 81
- assignment of, 263
- breach of, measures of damages for, 405 *seq*  
"anticipatory breach," 287  
contract for purchase of land, 426 *seq*
- building works, specific performance of contract for not usually advisable,  
764
- by advertisement, 57, 58
- by correspondence, 37-40
- by what law governed, 12.
- C I F with commission agent, 625
- capacity, 65 *seq*
- coercion, consent procured by, 125, 126
- condition against subletting, breach of 154
- conditional, 255-259
- consideration for, 16 *seq*  
unlawful, 144 *seq*
- contingent,  
definition of, 252  
enforcement of, 257  
execution dependent on specified event happening or not happening within  
fixed time, when void, 258  
when enforceable, 258  
impossible contingency agreement void, 259
- corporations, with, 375-378
- death of party does not generally affect obligation to perform, 260, 261
- deceit, contract not affected by, where no damage, 131.
- definition of, 13
- discharge of, mutual, 361

CONTRACT—*continued*

- divisible, 186-190, 773
- entire work, for, remuneration not recoverable unless work completed, 370
- fraud, effect of, on, 125, 144, 148
- implied 62
- impossible act, agreement for, void, 326
- infant's, 66-78
- insanity as bar to, 78, 80
- joint, liability is joint and several 293, 294
  - enforcement of, 305
- letter of credit is, when acted upon, 56
- lunatic's, 65, 78-80
- marriage brocage, 180
- misrepresentation, innocent, effect of, on, 119
- mistake as to nature, party and subject matter of, 85-91
  - in formation of, 82 *seq*
- mistake of fact, 131 *seq*
- morality, contrary to, 144, 148, 149
- native law of, 2 *seq*
  - how far still in force, 7
- necessaries, infant's contract for, 77, 382
- novation, 347-351
- of agent, enforcement of, 628, 634
  - liability of principal for, 629, 630
- of service, 289
- performance of, unlawful, 144 *seq*
  - time, when of essence of contract, 323
  - undisclosed impediment to lawful performance, 147
- personal, performance of, 291
  - enforcement of negative stipulation in, 212, 213
  - terminated by death of either party, 259, 260
  - whether assignable, 263 *seq*
  - with firm, whether affected by death of partner, 292
- "promise," meaning of, 13, 14
- quasi contracts, reimbursement of money paid under, 382, 383
- ratification of contract made by agent, 580
- readiness and willingness to perform, 315
- rescission of, 125-132
- reward, offer of, 68
- sale by one of several Hindu co parceners, 771.
- sale of land, for, when complete, 52-54
- seal, requirement of, 375-378
- specific performance of,
  - against whom cannot be specifically enforced, 819
  - against whom may be specifically enforced, 813.
  - for whom, cannot be specifically enforced, 803.
    - except with a variation, 811
  - for whom, may be specifically enforced, 801.

CONTRACT—*continued*specific performance of—*continued*

to execute building or other works, not convenient to decree specific performance of, 764.

which cannot be specifically enforced, 784.

where compensation in money is an adequate relief, 790.

where personal services involved, 790

where terms cannot be ascertained with reasonable certainty, 791.

where there is want of mutuality, 791.

which may be specifically enforced, 760.

statute, agreements contrary to, 148-154

terms of, implied, 50-52

third party cannot sue on, by English law, 20-22.

undue influence, contract induced by, 132 *seq*

unilateral, 32, 59

unlawful, 144 *seq*

void when party disables himself from suing by making unauthorised alteration, 375

voidable, 14, 125 *seq*rescission of, 365 *seq*, 380

writing, requirement of, 64

written, unauthorised alteration of, 353 *seq*

## CONTRIBUTION,

between co heirs for costs of litigation in respect of common property, 396, 397

co sharers of land, 389, 395, 396

co sureties, 507, 508 *seq*

joint promisors, 295-298, 300

joint wrongdoers, 301

judgment debtors, 301

no right of, between sureties by separate obligations for portions of same debt, 509

rateable, where liability varies, 509, 510

rateable distribution of loss arising from default of one joint debtor, 294

when liability arises, 300-301

where money paid by one under joint liability, 389

## CO OWNERSHIP, distinguished from partnership, 670

## CORPORATIONS,

contracts with, 375-378

public duties of, how enforced, 859, 860 *seq*

remission of performance of contract must satisfy conditions prescribed, 363

## CORRESPONDENCE, contract by, 37-40.

## CO SHARER, rights of, may be protected by grant of injunction, 877

## COSTS,

in suit for dissolution, apportionment of, 729

of defending action, agent's right to indemnity against, 624

## COUNSEL See BARRISTER

## COURT, DISCRETION OF,

- as to declaration of status or right, 840, 847.
- as to decreeing specific performance, 733, 798, 799.
- as to granting injunctions, 867-870, 874
- delay an element in exercise of, 798.
- intimately bound up with historical limits of jurisdiction, 796
- not arbitrary but sound and reasonable, 793
- rightly exercised in refusing to decree specific performance—
  - where plaintiff would derive unfair advantage over defendant, 793, 799
  - where plaintiff has done substantial acts or suffered losses, 795.
  - where some unforeseen hardship on defendant involved, 794, 800

COVENANT in lease granted to partner in his own name, liability of firm on, 698

CREDITOR, election of remedies by, in case of agency, 650

CRIMINAL ACT, agent cannot claim indemnity from principal against consequences of, 626

## CRIMINAL PROCEEDINGS,

- compromise of, 169-173
- threat of, 93, 102, 103, 169-173
- use of, in aid of civil claim, 170, n

CURRENCY, tender must be made in legal, 276-277

## CUSTOM OF TRADE,

- as to remuneration of agent, 611
- Bombay, as to purchase and sale of goods by agent, 599
- saving of, 10 *seq*

## DAMAGES,

- agreement to accept damages awarded by arbitrators, 350
- alternative claim to specific performance or election open until hearing, 784.
- consequences contemplated by parties at time of contract, liability for, 416
- consequential, 414, 417 *seq*
  - on breach of contract to pay money, 416
- for future injury, 879.
- for premature revocation of agent's authority, 593, 594
- fresh suit for, will lie though suit for specific performance dismissed, 784, 785
- Hadley v Barendale*, rule in, 418
- immovables, breach of contract for purchase of, 426-429
- interest by way of, 8, 429 *seq*
- liquidated distinguished from penalty, 434, 785
- liquidation of, no bar to specific performance, 785
- may be awarded where case for specific performance or injunction fails 782, 784.
- measure of, 405 *seq*
  - anticipatory breach 290
  - breach of contract for sale of land, 426-429
  - breach of covenant to repair, 429
  - property sold at higher price to third party in breach of contract, 426, n
  - sale of goods—
    - failure to accept goods made to order where no market price, 407, n
    - instalments, goods deteriorable by failure to deliver on due dates, 411

**DAMAGES**—*continued*measure of—*continued*sale of goods—*continued*

late delivery of goods, 408

loss of profit, 417

market value, evidence of, 406

non acceptance of goods by buyer, 407, *n*

non delivery of goods by seller, 406–408, 422

warranty, breach of, 415

where buyer suffers conviction and loses trade through harmful nature of goods sold, 415, *n*

where goods parted with by agent without payment, contrary to principal's instructions, 599

where goods sold by agent below limit authorised by principal, 598, 599.

where wrongful conversion of goods by agent, 409

payment of money, delay in, 416

penalty, stipulations for increased interest by way of, 429 *seq*

“reasonable compensation, what is, 455–458

remoteness of, 412 *seq*rule in *Hadley v Baxendale*, 418

title to land defective implied contract that ven for only liable for expenses, 429

waiver of, where performance accepted at time other than that agreed upon, 322, 323

warranty, breach of, on sale of goods 415

breach of implied warranty of authority by agent, 651, 652

where act promised impossible or unlawful to knowledge of promisor, 327

where contract rightfully rescinded, 460

**DAMDUPAT**, 8**DEATH**,

of bailee or bailor, terminates gratuitous bailment, 531

partner, dissolves partnership, 702, 709

party, does not affect contract, 209 *seq*

otherwise in case of personal contracts 261

party, effect on personal action for damages, 262

principal, revokes power of attorney, 588

proposer, effect of, 48

surety, generally revokes continuing guarantee, 477

**DEBT**,

arrears of revenue not a, within s 59 342

barred, promise to pay, 202 *seq*

judgment, within exception of barred debts in s 25 205

meaning of, within s 20 205

partnership, 298, 299, 659, 690–717–719

payment, appropriation of, 341 *seq*

appropriation as between principal and interest, 342

creditor's right to appropriate, 343

**DECFT**, does not affect contract where no damage, 131**DECLARATION OF WAR**, effect of, on contracts, 167 169

## DECLARATORY DECREE,

an innovation, 842.

as to right to possession, 851.

bar to, 840.

company, shareholder in, whether having "legal character" enabling him to claim declaration against directors, 843, *n*

declaration not made on facts not ripe for determination of legal consequences, 840, *n*

decree holder cannot seek declaration of debtor's title to property, 850.

discretion of Court to grant, where status or right denied, 840.

effect of, 859.

for purposes of, person "interested to deny," 852.

jurisdiction, exclusion or limitation by special legislation, 844.

person having a vested interest entitled to sue for, 858.

*contra* where interest contingent, 858.

possession should be claimed in suit for declaration of title to land, where defendant in adverse possession, 854

Privy Council, reluctance to overrule discretion of lower courts, 848.

reversionary heir, right of, to bring suit for, 857.

suit for,

against whom will lie, 840.

history of, 841-843

plaintiff to, must be a person entitled to any legal character or to any rights to any property, 843 *seq*

will not be dismissed if plaintiff omits to seek "further relief," 852.

title, questions of, such as existence of will not "further relief," 840, *n*

vote at election person who has taken no steps to get on register cannot sue for declaration that he is qualified, 840, *n*

what forms of declaration covered by, 845.

where no right to "further relief" shown, 857.

whether can be made independently of section 42 of S. R. A., 844.

will not be granted merely to set aside an assertion, 848

## DEED,

alteration of, after execution 353 *seq*

execution in agent's name, 613

necessary to contract, when, 61

DEFINITIONS *See* WORDS

## DELAY,

as bar to relief on ground of undue influence 113, 114

by way of specific performance or injunction, 797, 883.

DELEGATED AGENT *See* PRINCIPAL AND AGENT

DELIVERY, of goods, by instalments, refusal to perform contract of, 281, 282, 283  
on Sunday, 319  
place of, 31, 309-311  
time of, 318-309

**DEPOSIT,**

- bet, deposit pending event, recovery of, 250
- dismissal of purchaser's suit for specific performance no bar to a separate suit for return of, 782.
- forfeiture of, by vendor if sale goes off by default of purchaser, 782.
- not a penalty, 782.
- purchaser entitled to return of, 780.
- rights of parties determined by terms of contract, 780.

**DETENTION, unlawful, of property, 92, 95****DILIGENCE,**

- "ordinary," 131.
- standard of, 130.

**DISCHARGE OF CONTRACT,**

- by alteration of written contract, 351, 353
  - bankruptcy or insolvency, 268
  - breach of contract, 405
  - impossibility of performance, 326, 327 *seq*
  - performance, 259 *seq*
  - rescission by new agreement, 347 *seq*
  - settlement contract, effect of, 352
  - tender, 44

**DISCLOSURE,**

- no general duty of, 118, 120
- special duty of, in particular cases, 118
  - by trade usage, 118

**DISCRETION OF COURT** *See COURT***DISSOLUTION of partnership** *See PARTNERSHIP.***DISTRESS for rent, goods of third party in hands of auctioneer or factor privileged from, 664.****DIVISIBLE CONTRACT,**

- distinguished from entire, 186-190
- whether capable of being specially performed, 773

**DIVORCE, money paid to procure, not recoverable back, 183.****DOCUMENTS,**

- alteration of, 353
- what alteration material, 353 *seq*

**DOMICIL, capacity to contract governed by law of, 12, 65****DRUNKENNESS, contract while in state of, 80****DURESS,**

- detaining property is not, 92.
- execution of deed under, 93
- nearly obsolete in English law, 92

**EASEMENT OF LIGHT AND AIR, disturbance of, may be prevented by grant of injunction, 877.****ELECTION, of remedies by creditor, 650****ENEMIES,**

- dealings with, 335

ENGLISH LAW *See* COMMON LAW, EQUITY

# EQUITY,

- "catching bargains," relief in cases of, 109
- contribution between joint promisors *equitable doctrine* embodies in section 43 300
- Courts, Specific Relief how far administered in, 737.
- presumption of, as to time not being of essence of contract 323
- rule of, as to liability of deceased partner's estate for firm's debts, 294
- surety's equitable right to indemnity by principal, 497, 506

ERROR *See* MISTAKE

# ESTOPPEL,

- and consent 87
- by fraud or wrong, 70, 71-73
- judgment, unsatisfied, against one joint promisor, whether bar to subsequent action against other, 296
- of agent implied warranty of authority, 652 *seq*
  - bailee, 533
  - minor, 73
  - person holding himself out as partner, 682 *seq*
  - person signing stamped paper in blank, 87
  - principal inducing belief in agent's authority, 655-658
  - principal with regard to agent's contract, 629

# EVIDENCE,

- admissible to prove usage of trade, 10
- agreement purporting to restrict ordinary rules of evidence, 228
- burden of proof in contracts of lunatics 80
  - in cases of loss of or damage to goods by carrier, 621-622
  - in cases of undue influence 96, 97, 98, n, 103, 108
  - in dealings with *parda nishin* women, 88, 104 *seq*
  - of good faith in sales of goods, 551
  - unconscionable bargains, 108
- foreign law, proof of 141, 142
- of agreement being by way of wager 246
  - contract 64
- oral and documentary, 64
- to explain or vary written documents, 229
- unsound mind of, 80, n
- where variance between print and writing 65
- witness agreement to pay not enforceable, 165 195

PAID IN ACT (I of 1872) 186

PERFECTED CONSIDERATION *See* CONSIDERATION

# PLACITORS

- definition and rights under contracts 261 *seq*
- joint liabilities survival of, against executors of deceased joint promisor, 293 294
- of deceased partner duties of surviving partners who are 722
  - whether necessary parties in suit for debt due to firm and remuneration undertaking by third party to pay 19 612

EXECUTORY CONSIDERATION *See* CONSIDERATION.

"EXPECTANT HEIRS," fraud presumed in dealings with, 107, 109

EXPRESS PROMISE *See* PROMISE

FACT, mistake of, 134-139.

FACTOR,

authority of, 539, 540, 568

cannot be delegated, 575

whether coupled with interest and irrevocable, 591

for sale of goods, 591.

general lien of, for balance of account, 537, 539-541

goods of third party in hands of, privileged from distress, 664

pledge by, 551.

for antecedent debt, 551

who is a, 539.

*And see* PLEDGE, PRINCIPAL AND AGENT

FACTORS ACTS, repealed by Contract Act, 549

FEAR *See* COERCION

FIDUCIARY RELATIONS *See* UNDUE INFLUENCE

FINDER,

lien of, for compensation and expenses, 535

of goods, responsibility of, 400

duty to restore where means of discovering owner, 400

knowledge as to identity of owner immaterial, 400

right to sue for reward, 535

sale of article found by, 535, 536

FORBEARANCE TO SUE, as consideration, 27 *seq.*, 192, 193

apparent forbearance, 29

promise of forbearance, 30

FOREIGN LAW, proof of, 141, 142

FOREIGN STATE, suits against, in respect of contracts made on behalf of, 643

FORMATION OF CONTRACT,

by correspondence, 36-40

offer and acceptance necessary to, 54-59

FRAUD,

consent procured by, 91, 115, 125, 126

"constructive," 123

definition of, 114

fraudulent alteration of documents after execution, effect of, 353 *seq.*

fraudulent consideration or object of agreement, 144, 148, 162

guarantee obtained by misrepresentation or concealment, 502

marriage void for, in England, 91

minor, fraudulent representation by, 69, 72, 73

misrepresentation, relation of, to, 116, 117.

non-disclosure of material fact is, 118

of agent, in course of business, binds principal, 659

of partner, liability of firm for, 690, 691

FRAUD—*continued*

- partnership agreement, rescission of, for, 712
- pledge of goods obtained by, 554, 555
- presumed in dealings with "expectant heirs," 107, 109
- representatives, suit by, 129
- signature obtained by, 85, 86

*And see MISREPRESENTATION, UNDUE INFLUENCE*

## FRAUDS, STATUTE OF, 731

## FRUSTRATION,

- by war conditions, 330, 331, 335 *seq*

*And see IMPOSSIBILITY*

GAMING *See* WAGER

## GIFT, already made, not affected by absence of consideration, 191

GOODS, SALE OF *See* SALE OF GOODS

## GOODWILL,

- does not "survive" to continuing partner, 720
- meaning of, 703
- payment of share of profits for sale of, does not constitute partnership, 682

## GOVERNMENT, ratification of acts of public servants, 583

## GOVERNMENT OF INDIA ACT

- jurisdiction, income tax officer, 865.
- prohibition of jurisdiction in matter concerning revenue 865.

## GUARANTEE,

- company, discharge of guarantor of unpaid calls where shares forfeited, 482
- concealment of "material circumstance," what is, 501
- consideration for, 468
- continuing, 473
  - guarantee of fidelity of bank official is not, 474
    - nor is a guarantee for payment by instalments of sum certain within definite time, 474
  - revocation of, by notice, 474, 475, 476
    - by change in firm, 716
    - by death of surety, 477
- contract of, defined 467.
- contribution between co sureties, 507, 508
  - creditor defined 467
- creditor's duty of disclosure to surety, 502-501
- implied in indemnity of surety, 505
- limitation of amount 470
- obtained by misrepresentation or concealment, invalid 502
- of agent, loss must arise from misconduct in connection with agency, 472
  - bank official not a continuing guarantee, 474
  - collector mere passive acquiescence in larceny in keeping accounts will not discharge surety, 495
- principal debtor, defined, 467

**GUARANTEE—continued**

revocation by death of surety, 476

by notice, 474, 475, 476

what is notice, 476

"future transactions," meaning of, 474

servant's fidelity employer does not contract with surety to use diligence to check servant's work, 495

"surety" defined, 467

surety's liability, extent of, 469

where limited in amount, 470

surety's rights on payment on default of principal, 496

under agreement to give time to judgment debtor, 489

void where instrument not executed by intended co surety, 505

*And see* **PRINCIPAL AND SURETY**

**HIGH COURTS**, original jurisdiction of, 3 *seq*, 861.**HINDU LAW**,

adoption, void contracts as to, 159

application to Mahomedans, 4, 6

damdupat, of, 8

joint Hindu family, specific performance by co parceners in 815.

mortgage in favour of, but taken in name of minor, valid, 74.

name, use of, in trading firm 678

sale by father on behalf of himself and minor son, 371

marriage agreements in restraint of, 209

marriage contracts contrary to, 160

marriage in *Asura* form, 180, 181

married woman, capacity to contract unaffected in 78

married woman may contract jointly with husband, 78

minor, for marriage expenses, may be recovered as necessities, 382

minor, not personally liable where ancestral trade carried on by guardian, 683

partnership joint Hindu family firm, 678, 708

**HOLDING OUT**,

company not bound by false certificate of shares issued by secretary, 662

doctrine does not apply to torts, 686

liability as partner by, 682 683

liability of principal inducing belief in agent's authority, 655 656

personal liability of pretended agent, 652

**HUSBAND AND WIFE**,

agreement for future separation void, 160

wife as the agent of her husband, 561

cannot generally bind husband without his authority, 73

but may pledge his credit for necessities 73

*And see* **MARRIAGE, MARRIED WOMAN**

**IDENTITY**, error as to, 90**ILLEGAL CONTRACT** *See* **UNLAWFUL AGREEMENTS****IMMORALITY**, contracts void for, 148 161 *seq*

**IMMOVABLE PROPERTY,**

- appeal, none, from order or decree passed under section 9 of S. R. A., 747.
- limits of decree under section 9 of S. R. A., 753.
- object and scope of section 9 of S. R. A., 748, 749.
- possession, title and evidence, 748.
- recovering possession of, 746.
- restitution of dispossessed holder of, 747.
- sale of, arrears of revenue paid by purchaser, recovery from vendor, 386, n.
- damages for breach of contract, 426-429.
- suit must be brought within six months, 749.
- effect, if not so brought, 753.
- suit under section 9 of S. R. A. will not lie against the Government, 747.
- transfer of, 197.
- void where forbidden by statute, 157.

**IMPLIED CONTRACTS. See CONSTRUCTIVE CONTRACTS AND CONTRACTS IMPLIED BY LAW.****IMPLIED PROMISE. See PROMISE.****IMPOSSIBILITY,**

- agreement to do impossible act void, 326.
- arising from act of party, 318.
  - death or sickness of promisor, 329.
  - destruction of subject matter of agreement, 328, 379
- commercial, what is, 333.
- destruction of leased property by fire, 334
- frustration by war conditions, 330, 331, 335 *seq.*
- must be physical or legal, to discharge contract, 327-330.
- of performance of contract, 318, 319, 326, 327.
  - performance depending on existing thing or state of facts, 328, 379, 380.
- prohibition by executive action, 331.
- strike, effect on contract, 330.
- subject matter having partially ceased to exist, contract not wholly impossible of performance, 328.
- subsequent, effect of, 328, 329
- war conditions due to, 330, 331, 335 *seq.*

**INCOME TAX,**

- commissioner of I. T. may be ordered to state case on point of law, 600

**INDEMNITY,**

- against damages recovered and costs of suit, 465, 466.
- agent's right to, in respect of principal's business, 623.
  - limits of the right, 623
- contract of, defined, 462
- co sureties entitled to share in benefit of, 503.
- extent of promisee's rights 465.
  - rights of promisor not provided for, 466.
- indemnifier's liability, commencement and extent of, 463.
- of surety, implied, 505.
- right to, where money paid by person interested on behalf of another, 392, 393
- And see PRINCIPAL AND SURETY.*

INFANT *See* MINOR

## INJUNCTION,

agreement by employee not to exercise calling after expiration of employment not enforceable by, 213, n

as a form of preventive relief, 870.

damages may be awarded though not asked for where case for injunction fails, 784.

damages, whether awarded for future injury, 879.

enforcement of negative stipulation in personal contract by, 213

granting of, discretionary, 874, 883.

liquidation of damages, as bar to an award of relief by way of, 839

mandatory, 880-884

against co sharers and tenants, 884

delay and acquiescence may deprive plaintiff of his right for relief by way of, 883.

history of, 880-881.

may be granted although act not completed, 882.

when granted, 881.

negative agreement, to perform, 887-890.

obtainable when plaintiff's right to or enjoyment of property threatened, 871.

perpetual, 871, 874.

"property," meaning of, for purposes of obtaining, 876

special cases where, granted -

breach of trust, 879.

co sharers, landlord and tenant, 877.

continuing trespass, 877.

easement of light and air, 877.

multiplicity of judicial proceedings, 879

nuisance, 878

patent, copyright and trade mark, 872, 876, 879

waste, 879

stay of proceedings by grant of, 884, 885

temporary, 870

to prevent breach of contract, 875.

university, Court not authorised to review regulations and examination lists of, 880, n

when refused, 884

## INNKEEPER,

guest, position of, analogous to that of bailee, 520

liability of, for loss of guest's goods, 520, 521

lien of, on guest's goods, 537, n

INSANITY *See* LUNATIC

## INSOLVENCY,

discharges contract, 268

official assignee, money raised for suit by unlawful agreement with creditors, 157

of promisor, does not amount to refusal to perform contract, 291

*And see* BANKRUPTCY

## INSURANCE,

payment of policy, where dependent on proof of claim, 255

INSURANCE—*continued*

- policies, without interest, are wagering contracts, 249
- policy, incorporation of prospectus in, 35

## INTENTION, unlawful, not presumed, 147, 167

## INTEREST,

- appropriation of payments, 345
- damages, when payable as, 8, 429-432
- dampducat, rule of, as to limit of interest recoverable, 8
- excessive, disallowed in cases of unconscionable bargains, 108-112
- increased, stipulations for, whether by way of penalty, 437 *seq*
  - penalty, by way of, where stipulation retrospective and increase runs from date of bond, 452
  - relief against, 440 *seq*
- not payable in England except by express agreement or trade usage, 431
- on capital left in firm by retiring partner, 721.
- overdraft at bank, notice of increase in rate of, 61
- payment of, by debtor, whether keeping alive action against surety, 473
- penalty, interest by way of, 437 *seq*
  - relief against, 437, 447-455
- reasonable, what is, 133
  - as element in cases of unconscionable bargain, 108-112
- reduction of, where payments made regularly on due dates, 452
- stipulations for interest—
  - for compound interest, 444
  - for enhanced rate of interest, 437
  - for payment of interest at a lower rate, if interest paid regularly on due dates, 452
  - for payment of interest from date of bond, the rate of interest being exorbitant, 452
  - for payment of interest if principal not paid on due date, 447
  - from date of the bond, 437, 441
  - from the date of default, 437, 438, 441, 442
- subsequent, recovery of, under decree, 162
- surety's right to, on payment of principal's debt, 198

## INTERPRETATION, 13

INTOXICATION. *See* DRUNKENNESS

## INVOLUNTARY PAYMENT, what is, 403

## JOINT DEBTORS, suretyship between, 478

JOINT HINDU FAMILY. *See* HINDU LAW

## JOINT PROMISES, 302-307

## JOINT PROMISORS,

- contribution between, 294, 295, 300
- contribution between judgment debtors
  - when liability arises, 300, 301
- joinder of parties in suits against, under O. 1, r. 10, of C. P. C., 290.
- judgment unsatisfied against one, whether bar to subsequent action against other joint promisor, 295

**JOINT PROMISORS**—*continued*

- performance by, 295
- rateable distribution of loss arising from default of one joint promisor, 294
- release of one joint promisor, effect of, 302

**JUDGMENT**, unsatisfied, against one joint debtor, whether bar to subsequent action against other joint debtor, 296

**JUDICIAL PROCEEDINGS**, multiplicity of, may be prevented by grant of injunction, 879

**JUDICIAL REDRESS**, Specific Relief as a form of, 737.

**JURISDICTION**, original, of High Courts, 3 *seq.*, 859-861

**KACHHI ADAT CONTRACTS**, incidents of, 601

**LAND**,

- sale of, compensation for misdescription, 128, 129, 402
- damages for breach of contract, 426 *seq.*
- transfer of, 197.
- void, where forbidden by statute, 157

**LANDLORD AND TENANT** *See* INJUNCTION, LEASE LAW,

- governing contract, 12
- mistake of, 140, 401 *seq.*

**LEASE**,

- avoidance of, for mistake of fact, 135
  - where property destroyed by unavoidable cause, 334
  - where standard rent exceeded, 158
- breach of covenant to repair, measure of damages for, 429
- misconstruction of, payment under, not recoverable, 401, *n*
- part performance of contract to grant, 817, 819.
- partner, to, in his own name, liability of firm on covenants, 698
- rent, tender of, 276, 277
  - liability for, where lease taken in name of one partner, 698
  - payment to lessor's widow in error, recovery of, 401 *n*
- to minor, void, 74

**LETTER**,

- of acceptance, misdirection of, 39
- of credit, constitutes contract when accepted, 56
- posting or receipt of, a question of fact to be proved in ordinary way, 39
- proposal or acceptance by, 36-40

**LICENCE, EXCISE**, agreement to assign or sublet, 152, 153

**LIEN**,

- general, distinguished from particular lien 538
- general, of attorneys 537
  - of bankers, 537, 538
  - of factors 537, 539
  - of policy brokers 537
  - of solicitors, 537, 541
  - of wharfingers, 537, 541
- insurance for widow's benefit no lien on policy moneys as against creditors, 22

**INSURANCE**—*continued*

policies, without interest, are wagering contracts, 249

policy, incorporation of prospectus in, 35

**INTENTION**, unlawful, not presumed, 147, 167

**INTEREST,**

appropriation of payments, 345

damages, when payable as, 8, 429-432

damdapat, rule of, as to limit of interest recoverable, 8

excessive, disallowed in cases of unconscionable bargains, 108-112

increased, stipulations for, whether by way of penalty, 437 *seq*

penalty, by way of, where stipulation retrospective and increase runs from date of bond, 452

relief against, 440 *seq*

not payable in England except by express agreement or trade usage, 431

on capital left in firm by retiring partner, 721

overdraft at bank, notice of increase in rate of, 61

payment of, by debtor, whether keeping alive action against surety, 473

penalty, interest by way of, 437 *seq*

relief against, 437, 447-455

reasonable, what is, 133

as element in cases of unconscionable bargain, 108-112

reduction of, where payments made regularly on due dates, 452

stipulations for interest—

for compound interest, 444

for enhanced rate of interest, 437

for payment of interest at a lower rate, if interest paid regularly on due dates, 452

for payment of interest from date of bond, the rate of interest being exorbitant, 452

for payment of interest if principal not paid on due date, 447

from date of the bond, 437, 441

from the date of default, 437, 438, 441, 442

subsequent, recovery of, under decree, 162

surety's right to, on payment of principal's debt, 498

**INTERPRETATION**, 13**INTOXICATION** See **DRUNKENNESS****INVOLUNTARY PAYMENT**, what is, 403**JOINT DEBTORS**, suretyship between, 478**JOINT HINDU FAMILY** See **HINDU LAW****JOINT PROMISEES**, 302-307**JOINT PROMISORS,**

contribution between, 294, 295-300

contribution between judgment debtors, 391

when liability arises, 300, 301

joinder of parties in suits against, under O. 1, r. 10, of C. P. C., 290.

judgment unsatisfied against one, whether bar to subsequent action against other

joint promisor, 296

**JOINT PROMISORS**—*continued*

performance by, 295

proportionate distribution of loss arising from default of one joint promisor, 294

release of one joint promisor, effect of, 302

**JUDGMENT**, unsatisfied, against one joint debtor, whether bar to subsequent action against other joint debtor, 296

**JUDICIAL PROCEEDINGS**, multiplicity of, may be prevented by grant of injunction, 879

**JUDICIAL REDRESS**, Specific Relief as a form of, 737

**JURISDICTION**, original, of High Courts, 3 *seq*, 859-861.

**KACHHI ADAT CONTRACTS**, incidents of, 601

**LAND**,

sale of, compensation for misdescription, 128, 129, 402

damages for breach of contract, 426 *seq*

transfer of, 197.

void, where forbidden by statute, 157

**LANDLORD AND TENANT** See **INJUNCTION**, **LEASE**

**LAW**,

governing contract, 12

mistake of, 140, 401 *seq*

**LEASE**,

avoidance of, for mistake of fact, 135

where property destroyed by unavoidable cause, 334

where standard rent exceeded, 158

breach of covenant to repair, measure of damages for, 429

misconstruction of, payment under, not recoverable, 401, *n*

part performance of contract to grant, 817, 819.

partner, to, in his own name, liability of firm on covenants, 698

rent, tender of, 276, 277

liability for, where lease taken in name of one partner, 698

payment to lessor's widow in error, recovery of, 401, *n*

to minor, void, 74

**LETTER**,

of acceptance, misdirection of, 39

of credit, constitutes contract when accepted, 56

posting or receipt of, a question of fact to be proved in ordinary way, 39

proposal or acceptance by, 36-40

**LICENCE, EXCISE**, agreement to assign or sublet, 152, 153

**LIEN**,

general, distinguished from particular lien, 538

general, of attorneys, 537

of bankers, 537, 538

of factors 537, 539

of policy brokers, 537

of solicitors, 537, 541

of wharfingers, 537, 541

insurance for widow's benefit no lien on policy moneys as against creditors, 22

**LILLY—continued**

- of agent, 619
- of bailee, 536
- of finder of goods, 535
- of pawnee, 544
  - extent of right, 545

**LIMITATION,**

- account stated does not amount to promise, 204
- "acknowledgment" distinguished from "promise," 203
- agent, promise by, to pay barred debt, 203, 205
- agreement providing for enforcement of rights within stated period, 224
- interest, payment of, by debtor, whether keeping alive action against surety, 473
- of claim of deceased partner's estate against surviving partners, 722
- of suit for account after dissolution of partnership, 729
- of suit for cancellation of instrument, 937, 938.
- of suit for dissolution of partnership, 729
- of suit for restitution under section 9 of S R A, 749.
- of suit for restitution under section 65 378
- of suit to enforce terms of award, 823.
- of suit to rescind contracts, 833.
- proceedings in respect of loan or of goods pledged, 548
- promise to pay barred debt, 202-207
- promise to pay, what amounts to signature by agent, 203, 205

**LIMITATION ACT, 654, 697, n, 729, n, 749, 838****LOAN,**

- for gaming or to pay gambling debt, recoverable, 243, 244
- of chattel *See* BAILMENT
- of money to firm *See* PARTNERSHIP
- oppressive, relief against 133

**LOST DEED, suit to restore terms of, 765****LOTTERY,**

- "chit fund" plan is not a, 252
- participation in, a criminal offence, 251
- what is, 251

**LUNATIC,**

- contract of, 65, 78 80
  - burden of proof lies on person affirming contract, 80
- drunkenness equivalent to insanity, 80
  - but burden of proof is shifted to person setting up disability, 80
- insanity of proposer, effect of, 48
- lucid interval contract in, 81
- property of, where so found by inquisition in England 81
- sound mind, what is, 80
- unsound mind evidence of 80, n

**MAHOMEDAN LAW,**

- application to Hindu, 4, c
- husband and wife agreement for future separation void 163
- marriage, agreements in restraint of 209

**MAHOMEDAN LAW**—*continued*

marriage contracts contrary to, 209

married woman not disqualified from contracting by, 78, 79

**MAINTENANCE**, common law of, not applicable to India, 2, *n*, 174

*And see* CHAMPERTY

**MAJORITY**, age of, 67

**MANDAMUS** (writ of),

abolished by section 45 of S R A, 859, 860, 867.

defined, 860, 861.

**MARRIAGE**,

agreements in restraint of, 209

*Asura*, 180, 181

contract contrary to Mahomedan law, 160

contract to procure, for reward, in England, 180

in India, 180-183

effect of, on property of wife, 78, 79

minor, agreement to pay money to parent or guardian for consent to marriage,  
void, 181, 372, 373

recovery of money paid under 373

presents to bride by father of bridegroom, recovery of where marriage does not  
take place, 182

promise, breach of

contract by guardian, damages given in case of, 69

does not survive against executors, 261

promise by married man to marry another on his wife's death, void, 165

but suit maintainable by promisee without notice that promisor is  
already married, 165, *n*

what amounts to, 288, 289

void for fraud and coercion in England, 91

**MARRIAGE BROCAGE CONTRACTS**, 180**MARRIED WOMAN**,

cannot generally bind husband without his authority, 78

but she may pledge his credit for necessities, 78

contract, capacity to, not affected by marriage, 78

Hindu, may contract jointly with husband, 78

implied authority to pledge husband's credit, 561-563

Mahomedan, may contract, 78, 79

Married Women's Property Act, 79

separate estate, 79

contract, liability for, 78, 79

may sue and be sued alone in respect of, 79

wages and earnings are, 79

suit by or against, in respect of separate property, 79

**MASTER AND SERVANT**,

bailee's liability for negligence of servant, 524

contract of service, anticipatory breach of, 289, 290

**MASTER AND SERVANT**—*continued*

remuneration of servant by share of profits, 674, 681

wrongful dismissal of servant determines condition restraining servant from, carrying on similar business after termination of service, 213, *n*, 283

**MERCANTILE CONTRACT**, time of the essence, presumed, 324

**MERCANTILE USAGE**, 9 *seq*, 63

**MERGER**, by decree against joint debtor, whether, 297, 298

**MINOR**,

act done for benefit of, under section 70, whether including minor, 399

cancellation of instrument executed by, 839.

cannot both repudiate agreement and retain advantage acquired under it, 366

contract of, at common law, 66, 77

cannot be specifically enforced, 76, 791, 792

nor ratified, 74

capacity to, governed by law of domicile, 67, 68

void, 68-76, 366

estoppel of, by fraud or wrong, 70, 71-73

fraudulent representation of age by, 69, 72, 73

guardian, promise by, to pay barred debt, 205

guardian, sale or purchase of property by, 76

lease to, void, 74

loan to, on false representation of full age, 73

majority, age of, 67

marriage, agreement to pay money to parent or guardian for consent to, void, 181,

372, 373

marriage, breach of promise where contract made by guardian, 69

mortgage by, void, 73

mortgage in name of, but in favour of joint Hindu family, valid, 74

mortgage of property of, by administrator, 157

necessaries, liability for, 77, 368

cost of, recoverable from minor's estate, 382

costs incurred in defending suit are, 382

loan to save property from sale under decree is, 382

money advanced for marriage expenses recoverable as, 382

money advanced for, probably recoverable in England, 75, 77

what are, 77, 382

**partner**,

personally liable for antecedent debts unless he disclaims on attaining majority, 688

Hindu minor not personally liable where ancestral trade carried on by guardian, 688

Mahometan widow cannot make partnership contract for her minor children, 69

share of, liable for obligations of firm, 686

promise on attaining majority to repay money borrowed during minority bad for want of consideration, 201

**MINOR—continued**

- promissory note, given after majority for debt incurred during minority, void, 74
- promissory note in favour of, validity of, 74
- purchase by guardian on behalf of, valid, 73, 74
- sale of property by or to, void, 73
- suit by, 65, 68

**MISDESCRIPTION**, compensation for, on sales of land, 128, 129, 402.

**MISREPRESENTATION,**

- as to tonnage of ship avoidance of charterparty for, 124
- by agent, in course of business, binds principal, 659.
- compensation for misdescription, 128, 129
- consent obtained by, 125, 126
- definition of, 118
- guarantee obtained by, invalid, 602
- in English law, 119
- innocent, by directors of company, 122
- innocent, effect of, 119, 120
- means of discovering truth of statement, 129
- of age by minor, 69, 72, 73
- partnership agreement, rescission of, for, 712
- "positive assertion," meaning of, 118, 121
- relation of, to fraud, 116
- signature obtained by, 85, 86
- title, of, rescission of contract for, after conveyance and possession, 831, *n*

**MISTAKE,**

- agent's right to sue for money paid by, on principal's behalf, 639
- apparent consent given under, 84, 85
- as to existing fact, 135
- compromise of suit brought about under, 136
- contract only avoided where mistake relates to essential fact, 135
- fundamental error as to nature of transaction 85, 130
  - person of other party, 88
  - subject matter of contract, 90
- in formation of contract, 82, 83
- lease, avoidance of, for, 140
  - erroneous payment of rent under to lessor's widow, recovery of, 401, *n*.
- of counsel, 136
  - fact, 134 *seq*, 140, 143, 401
  - law, 140 *seq*, 401, 402
- of law, does not generally invalidate contract, 140
  - except in cases of fundamental error, 140, 141
- order of Court may be set aside for, 136
- payment by, liability of payee, 401
- railway carriage, payment of unauthorised surcharge for, 140, *n*
- recovery of money paid under, 141, *n*, 370, 401 *seq*
- rectification of instruments on ground of, 139
- specific performance, right to resist on ground of, 139
- word does not denote any general legal principle, 83

**MONEY LENDER**, concealment of identity by, 132

**MONEY PAID**, recovery of *See* **PAYMENT**.

**MONOPOLY**, agreement tending to create, void, 183

**MORALITY**, agreements contrary to, void, 144, 164

**MORTGAGE**,

by minor, void, 73

Court will not allow transaction where money obtained by fraud of minor, 70

*deorha* clause for payment of increased principal sum on redemption, 436 *n*

fraudulent alteration of mortgage after execution, effect of, 352

of minor's property by administrator, 157.

of partnership property by partner, when binding on firm, 698

*pattah* transactions, 23

personal covenant not enforced where security illegal, 189

redemption, loss of right of, 142

release by one of two joint mortgagees discharges mortgagor, 277, 303

**MORTGAGEE**,

failure to advance full amount of loan, 285, 790.

renewing a lease by, 743

sale of land by, "subject to all defects, 137

**MORTMAIN, STATUTE OF**, not applicable to India, 2, *n*

**MOVABLE PROPERTY**,

specific, recovery of, 746.

**MUFASSAL**, law administered in the, 5

**MUTUAL PROMISES**, 29, 30

**NAME**

assumed, fraudulent use of, by money lender, 132

firm name, 676, 720.

joint Hindu family name, use of, in trading business, 678

right to use after dissolution, 720

no monopoly in, 677.

no positive right of person to use his own name for all purposes, 678

but Court will not restrain use of name merely because it resembles that of a trade rival, 677.

**NATIVE LAW**,

of contract, 2 *seq*

how far still in force, 7

**NCESSARIES**,

costs incurred in defending suit are, 382

liability of infant for, 77, 382

loans to save property from sale under decree are, 382

money advanced for marriage expenses recoverable, 382

money advanced for, probably recoverable in England 77 77

supplied to wife liability of husband for, 561-52

what are, 77, 382

[*and see* **MISCELLANEOUS**]

## NEGLIGENCE,

- agent, liability for, 597-599*
- bailee cannot contract himself out of liability for, 524
- gross, gratuitous agent liable to principal for, 603, 604
  - agent guilty of, forfeits right to remuneration, 618*
  - and may even lose right to recover disbursements, 618*
  - what is gross negligence, 603.*
- of carrier, burden of proof, 515, 517
- of innkeeper, 520-521
- of principal, injury to agent caused by, 627.
- of servant, bailee's liability for, 524

## NEGOTIABLE INSTRUMENT,

- alteration of, material, if unauthorised, avoids instrument, 353, 354, 359, 360
- consideration for, presumed, 197.
- indorser, discharge of, where remedy against prior party impaired, 49
- payment by, at request of creditor, 312
- promissory note, definition of, 230, *n*
- signature by agent, 644
- signature of blank stamped paper, implied authority to holder, 87
- time for presentment for acceptance or payment, 303
- And see BILL OF EXCHANGE, PROMISSORY NOTE*

## NEW YORK, DRAFT CIVIL CODE OF, 82, 119, 121, 209, 536, 824.

NON OCCUPANCY RAIYAT, right to bring a possessory action under section 9 of  
S R A, 754.

## NOTICE,

- of dissolution of partnership, 722
- excess of authority by agent, 658
- partner's restricted authority to bind firm, 699
- revocation of agent's authority, 594*
- revocation of continuing guarantee, 474, 475
- revocation of proposal, 44
- special conditions on tickets, etc., 34
  - inability to read no excuse, 34, n*
- of increase in rate of interest on overdraft 61
- to agent is notice to principal, 631 *seq*

## NOVATION,

- definition of, 347.
- effect of, 347, 351.
- limited application of term in England 351
- on change in firm, 347, 348
  - distinct acts necessary, 348*
- question of fact, 350
- trustees not entitled to make, 348

## NUISANCE, may be prevented by grant of injunction 873.

## OFFER

- and acceptance, English rule as to 78-80
- by advertisement, 76, 57.

**OFFER**—*continued*.

- by bookseller's catalogue, 57.
- general, 55 *seq.*
- proposal synonymous with, 14.
- relation of, to proposal, 14, 15.
- revocation of, 40 *seq.*
- reward, of, 56.
- standing, 43.
- to perform, must be unconditional, 269, 271.
  - and entire, 269, 270.
- effect of refusal of offer, 368, 369.

**ORDER OF COURT** may be set aside for mistake, 136.

**PAKKA ADAT CONTRACTS,**

- incidents of, 599, 614
- Pakka Adatia* and broker liable on contracts, distinction between, 600, 601.
- place of performance in, 311.

**PARDA-NISHIN WOMEN,**

- contract with : burden of proof, 88, 104 *seq.*
- dealings with, analogous to transactions with "expectant heirs" in England, 107.
- meaning of expression, 107.

**PARENT AND CHILD**, transactions between, 100, 101.

**PARTIES,**

- joinder of, under O. 1, r. 10, C. P. C., 299, 299, n.
- representatives of deceased partner, whether necessary parties in suit
  - for debt due to firm, 305
  - may join surviving partners in suit for recovery of partnership debt, 305, 306.
- suit against one partner only for debt of firm, 297, 298
- by one partner for money lent by him to firm, 725.

**PARTNER,**

- actions by and against use of firm name, making partner in substance plaintiff
  - and defendant not authorised, 676, n.
- admission by is evidence against firm, 696.
- advances to firm by, 703.
- assignment of share, effect of, 707.
- author receiving royalty on book is not, with publisher, 672.
- authority of, to bind firm, 693 *seq.*
- authority, continuing, after dissolution, 710 *seq.*
  - firm not bound where neither real nor apparent authority, 699.
  - in particular transactions, 697.
  - restriction of authority, 699.
- bill of exchange, authority to draw, 698
- child of deceased partner receiving annuity out of profits not a, 691.
- common partners, actions by and against firms with, 726.
- competition with firm, 715.
- conduct of, as ground for dissolution, 711.

PARTNER—*continued*

death of, dissolves partnership, 702, 709

generally determines contract for personal agency or service, 292

debts of firm, liability for, 299, 689, 717

deceased, administration of assets of, 717

claim of estate against surviving partners subject to Statute of Limitations, 722

liability of estate for subsequent obligations, 717

dormant partner, liability of, 723

duty to account to firm in partnership transactions, 714

for secret profits, 715

duty to attend to business of firm, 702, 707, 714

executor of deceased partner, duties of, as to deceased partner's share, 721, 722

expulsion of, 702, 709

fraud of co partner, liability for, 690, 691

general duties of partners to one another, 714

holding out, person liable by, 682

indemnity and contribution right to, 706

interest on capital left in firm by retiring partner, 721

lease, liability for covenants in, where taken in name of one partner, 698

lender of money in return for share of profits is not a, 679

liability, whether joint and several, 299, n

majority, power of, to bind minority, 702, 707

minor not personally liable as 686, 687

but liable for antecedent debts unless he disclaims on attaining majority, 688

misconduct of, dissolution for, 711

new, cannot be introduced without consent of all, 702, 708

notice restricting authority to bind firm, 699

• notice to, is notice to firm, 697

person receiving share of profits for sale of goodwill is not a, 682

relations of partners to one another, rules determining in absence of express agreement, 701 *seq*

representatives of, whether necessary parties to suit for debt due to firm 306

retirement of, 702, 708

right of, to inspect books of firm, 710

servant or agent remunerated by share of profits not a 674, 681

share of, does not include advances to firm, 705

ship, part owners of, not necessarily partners, 671

suit against one partner only for debt of firm, 297, 298, 299

by one partner for money lent to firm not maintainable, 725.

but suit will lie if brought on transaction not involving general account of partnership dealings, 725

surviving, joinder of, in suit by representatives of deceased partner for debt due to firm, 305, 306

not a trustee for outgoing or deceased partner's representatives, 722

tort of, liability of firm of, 690, 691.

widow of deceased partner receiving annuity out of profits not a, 641.

**OFFER**—*continued*

- by bookseller's catalogue, 57
- general, 55 *seq*
- proposal synonymous with, 14
- relation of, to proposal, 14, 15
- revocation of, 40 *seq*
- reward, of, 56
- standing, 43
- to perform, must be unconditional, 269, 271
  - and entire, 269, 270
- effect of refusal of offer, 368, 369.

**ORDER OF COURT** may be set aside for mistake, 136

**PAKKA ADAT CONTRACTS,**

- incidents of, 599, 614
- Pakka Adatia* and broker liable on contracts, distinction between, 600, 601
- place of performance in, 311.

**PARDA NISHIN WOMEN,**

- contract with burden of proof, 88, 104 *seq*
- dealings with, analogous to transactions with "expectant heirs" in England, 107.
- meaning of expression, 107

**PARENT AND CHILD**, transactions between, 100, 101

**PARTIES,**

- joinder of, under O 1, r 10, C P C, 299, 299, n
  - representatives of deceased partner, whether necessary parties in suit for debt due to firm, 305
  - may join surviving partners in suit for recovery of partnership debt, 305, 306
  - suit against one partner only for debt of firm, 297, 298
  - by one partner for money lent by him to firm, 725

**PARTNER,**

- actions by and against use of firm name, making partner in substance plaintiff and defendant not authorised, 676, n
- admission by is evidence against firm, 696
- advances to firm by, 703
- assignment of share, effect of, 707
- author receiving royalty on book is not, with publisher, 672
- authority of, to bind firm, 693 *seq*
- authority, continuing, after dissolution, 719 *seq*
  - firm not bound where neither real nor apparent authority, 699.
  - in particular transactions, 697
  - restriction of authority, 697.
- bill of exchange, authority to draw, 698
- child of deceased partner receiving annuity out of profits not a, 691.
- common partners, actions by and against firms with, 726.
- competition with firm, 715
- conduct of, as ground for dissolution, 711

PARTNER—*continued*

- death of, dissolves partnership, 702, 709
  - generally determines contract for personal agency or service, 292
- debts of firm, liability for, 299, 689, 717
- deceased, administration of assets of, 717
  - claim of estate against surviving partners subject to Statute of Limitations, 722
  - liability of estate for subsequent obligations, 717
- dormant partner, liability of, 723
- duty to account to firm in partnership transactions, 714
  - for secret profits, 715
- duty to attend to business of firm, 702, 707, 714
- executor of deceased partner, duties of, as to deceased partner's share, 721, 722
- expulsion of, 702, 709
- fraud of co partner, liability for, 690, 691
- general duties of partners to one another, 714
- holding out, person liable by, 682
- indemnity and contribution right to, 706
- interest on capital left in firm by retiring partner, 721
- lease, liability for covenants in, where taken in name of one partner, 698
- lender of money in return for share of profits is not a, 679
- liability, whether joint and several, 299, *n*
- majority, power of, to bind minority, 702, 707
- minor not personally liable as, 686, 687
  - but liable for antecedent debts unless he disclaims on attaining majority, 688
- misconduct of, dissolution for, 711
- new, cannot be introduced without consent of all, 702, 708
- notice restricting authority to bind firm, 699
- notice to, is notice to firm, 697
- person receiving share of profits for sale of goodwill is not a, 682
- relations of partners to one another, rules determining in absence of express agreement, 701 *seq*
- representatives of, whether necessary parties to suit for debt due to firm 306
- retirement of, 702, 708
- right of, to inspect books of firm, 710
- servant or agent remunerated by share of profits not a, 674 681
- share of, does not include advances to firm, 705
- ship, part owners of, not necessarily partners, 671
- suit against one partner only for debt of firm, 297, 298, 299
  - by one partner for money lent to firm not maintainable, 725
    - but suit will lie if brought on transaction not involving general account of partnership dealings, 725
- surviving, joinder of, in suit by representatives of deceased partner for debt due to firm, 305, 306
  - not a trustee for outgoing or deceased partner's representatives, 722.
- tort of, liability of firm of, 690, 691.
- widow of deceased partner receiving annuity out of profits not a, 681.

## PAYMENT,

- appropriation of, 341 *seq* See APPROPRIATION OF PAYMENT
- by cheque, at request of creditor, 312
- by instalments, 273, 276
- delay in, liability to consequential damages due to, 416
- for unlawful object cannot be recovered back, 164, 165
  - otherwise with money paid to compromise charge of adultery, where charge proceeded with, 171
- involuntary, 403
- made for another, recovery of, 382 *seq*
  - payment must be to another person, 392
  - and "lawfully" made, 397
- time of, stipulations as to, not generally of essence of contract, 324
- to agent, must be in cash, 565
  - unless custom authorises cheque or bill of exchange, 565
  - set off does not bind principal unless authorised, 565
- to unauthorised agent, 312
- under mistake 401 *seq*
- under unlawful agreement, recovery of, 164, 368, 369 *seq*
- voluntary, not in itself evidence of promise to continue it, 19
- wrongful, 404

## PENALTY,

- and liquidated damages, distinction between, 434
- interest, compound when by way of penalty, 444
- interest, increased, stipulation for, whether by way of penalty, 437 *seq*
  - always by way of penalty where stipulation retrospective, and increase runs from date of bond, 447
  - relief against, 437, 447-455 *seq*

## PERFORMANCE,

- ability and willingness to perform, 272, 315
- and consideration, 145, 146
- avowment of, now obsolete, 317
- breach before time of, 289
- conditional refusal to perform contract, 234
- corporation, remission must satisfy prescribed conditions, 363
- by joint promisors 294
- by third person, effect of, 293
- death of party, performance not generally affected by, 261
  - otherwise in case of personal contracts 231, 291
- delay in completion caused by act of party, 322
- disability to perform due to party's own fault, 287
- excused where reasonable facilities for performance not afforded by promisee, 340
- extension of time for fresh consideration not necessary, 364
- failure to perform by specified time, 322
- impossibility of 320
  - arising from act of party 318
- insolvency does not amount to failure to perform 291.
- must be as prescribed by law

**PERFORMANCE**—*continued*.

- no right to damages where performance accepted at time other than that agreed upon, 322, 323.
- not obligatory where rescission or alteration agreed to, 380
- of personal contracts, 291 *seq.*
- of reciprocal promises, 312 *seq.*
- offer to perform must be unconditional, 271
- order of performance of mutual promises, 317.
- palka adat* contracts, place for performance in, 311.
- person to perform contract, 291
- place for, 308, 310
- promisee may dispense with, 360
- readiness and willingness to perform, proof of, 315
  - demand for delivery without payment or tender is not, 316
- refusal of offer, effect of, 268, 269
- refusal to perform substantial part of contract, 284
- refusal to perform whole of contract, 280 *seq.*
- remission of, 362-364
- repudiation, what amounts to, 281, *n*
- time for, 307.
  - extension of, 364
  - what is "reasonable time," 307
  - when of essence of contract, 323
  - where time specified and no application to be made, 308
- unlawful, 149
- waiver of performance of concurrent act by other party, 315
- where acts of performance concurrent, 315
- where promises mutual, obligation to perform dependent on readiness and ability of other party, 312, 313

**PERSONAL CONTRACT** *See* **CONTRACT**.**PLEADER**,

- cannot compromise suit without express authority, 568
- promise by, to pay barred debt, 205

**PLEADING**,

- in cases of unlawful agreement, 185, 186
- specific averment of performance not now necessary, 317

**PLEDGE**,

- buyer obtaining possession of, 553
  - and person who has agreed to buy, 553
- co owner in possession, by, 552
- definition of, 543
- documents of title to goods what included under, 543
- factor, by, for antecedent debt, 551
- fraud, goods obtained by, 554, 555
- good faith, requirement of, 551
- hirer under hire purchase agreement may make valid pledge, 541
- limitation of proceedings in respect of goods pledged, 548
- limited interest, by person having, 555

**PLEDGE**—*continued*

- mercantile agent, pledge by in ordinary course of business valid, 548
- revocation of authority of, 551
- mortgagee and subsequent pledgee, competition between, 533
- notice may be express or constructive, 551.
- person entrusted for specific purpose cannot make valid pledge, 551
- person in possession under voidable contract, by, 551
- "possession," meaning of, 550
- "possession" of goods does not now give right to, 550
- Sale of Goods Act, 1930, provisions of, 552
- seller or buyer in possession after sale, 552, 553
- share certificates are not documents of title to goods, 553

**POLICY-BROKER,**

- implied authority of, 569
- lien of, 537

**POLICY, LIFE,** incorporation of prospectus in, 35, 36**"POSITIVE ASSERTION,"** meaning of, 122, 123**POST,**

- acceptance of proposal by, 37-40
- offer or demand by, generally authorises reply by letter, 54, n

**POWER OF ATTORNEY,**

- nature and construction of, 565
- payment in good faith under, not affected by uncommunicated revocation of authority, 588
- power to carry on mercantile business does not authorise drawing or indorsement of bills and notes, 561
- power to sell does not imply authority to mortgage, 561
- revocation of power by death of principal, 588

**PRISUMPTION** See **INDEX****PREVENTIVE RELIEF,**

- discretion of Court, 870.
- how granted, 870.
- nature of, granted by Courts, 867.
- perpetual injunctions, 871.
- principles governing granting of, 867-870
- temporary injunctions, 870.

**PRICE,** tender of, 316, 317**PRINCIPAL AND AGENT,**

- acknowledgment of debt by agent after death of principal, whether binding principal's estate, 596, 597
- agency in general, 557
  - consideration not necessary for creation of, 540
  - coupled with interest, 638
- agent defined, 557
  - actions by and against, on contracts, 611 seq
  - authorised to receive payment is not a bailee, 512, 513
  - bribery of, 661

PRINCIPAL AND AGENT—*continued.*

agent defined—*continued*

forfeits commission and even right to recover disbursements by negligence, 609, 618 .

liability for acts of another appointed to act for principal, 579.

as, 194, 195 do not apply where agent instructed to hand over business to named agent, 579

liability for loss occasioned by departure from instructions, 598.

liability to repay money received to principal's use, 668

must account to principal for money received under unlawful contract, 614, 615

right to indemnity, 623 .

unauthorised, payment to, with notice of want of authority, 312

when entitled to commission, 615, 616, 617.

who may be, 509

who may employ, 559

alternative remedies against principal and agent where both liable, 650, 651.

authority of agent, extent of, 563 *seq*

construed according to usual course of dealing in particular business, 564

coupled with interest, 589-591.

in emergency, 573

may be expressed or implied, 560, 561.

right to sue on contract, 628 *seq*

attorney, 567

auctioneer, 570

broker, 569

counsel 567

delegation of, 574 *seq*

emergency, in 573

excess of, 622, 624, 652

exercise of, what is, 592

express and implied authority defined, 560.

factor, 568-591

implied 560, 561

implied warranty of 652

joint authority implied where given to two or more persons 559

manager of business has no implied authority to borrow money to carry on business, 574

may be express or implied, 560

measure of damages for breach of warranty, 653

pleader, 567

power of sale does not imply authority to mortgage property, 581

power to carry on mercantile business does not authorise drawing or indorsement of bills and notes 561

principal estopped by conduct from denying agent's authority, 655-658.

revocation of, 587 *seq*

shipmaster, 570-573

to raise specified amount on securities does not authorise loan of smaller sum, 630, *n*

**PLEDGE**—*continued*

- mercantile agent, pledge by in ordinary course of business valid, 548
- revocation of authority of, 551
- mortgagee and subsequent pledgee, competition between, 553
- notice may be express or constructive, 551
- person entrusted for specific purpose cannot make valid pledge, 551
- person in possession under voidable contract, by, 551
- "possession," meaning of, 550
- "possession" of goods does not now give right to, 550
- Sale of Goods Act, 1930, provisions of, 552
- seller or buyer in possession after sale, 552, 553
- share certificates are not documents of title to goods, 553

**POLICY-BROKER,**

- implied authority of, 569
- lien of, 537

**POLICY, LIFE**, incorporation of prospectus in, 35 36**"POSITIVE ASSERTION,"** meaning of, 122, 123**POST,**

- acceptance of proposal by, 37-40
- offer or demand by, generally authorises reply by letter, 54, n

**POWER OF ATTORNEY,**

- nature and construction of, 565
- payment in good faith under, not affected by uncommunicated revocation of authority, 588
- power to carry on mercantile business does not authorise drawing or indorsement of bills and notes, 561
- power to sell does not imply authority to mortgage, 561
- revocation of power by death of principal, 588

**PRESUMPTION** See **EVIDENCE****PREVENTIVE RELIEF,**

- discretion of Court, 870
- how granted, 870
- nature of granted by Courts, 867
- perpetual injunctions, 871.
- principles governing granting of, 867 870
- temporary injunctions, 870.

**PRICE**, tender of, 316, 317**PRINCIPAL AND AGENT,**

- acknowledgment of debt by agent after death of principal, whether binding principal's estate, 596, 597
- agency in general, 557
  - consideration not necessary for creation of 560
  - coupled with interest, 635
- agent defined 557
  - actions by and against, on contracts 631 637
  - authorised to receive payment is not a bailee, 512, 513
  - bribery of 661

## PRINCIPAL AND AGENT—continued

## agent's duties and liabilities

fruits of commission and every right to recover disbursements by negligence, 609, 614.

liability for acts of another appointed to act for principal, 579.

see 194, 195 does not apply where agent is directed to hand over business to named agent, 579

liability for loss occasioned by departure from instructions, 598.

liability to repay money received to, principal's use, 621.

misaccount to principal for money received under contract, 611, 615, right to indemnity, 622.

unauthorized payment to, with notice of want of authority, 612.

when entitled to commission, 613, 616, 617.

who may be, 552.

who may employ, 552.

alternative remedies against principal and agent where both liable, 630, 631, authority of agent, extent of, 563 *seq*

construed according to usual course of dealing in particular business, 564

coupled with interest, 582, 591.

in emergency, 573.

may be expressed or implied, 560, 561.

right to sue on contract, 628 *seq*.

attorney, 567.

auctioneer, 570

broker, 569

counsel, 567

delegation of, 574 *seq*

emergency, in, 573

excess of, 622, 624, 652

exercise of, what is, 612

express and implied authority defined, 560.

factor, 568, 591

implied, 560, 561

implied warranty of, 652

joint authority implied where given to two or more persons, 576.

manager of business has no implied authority to borrow money for business, 574

may be express or implied, 560

measure of damages for breach of warranty, 654.

pledger, 567

power of sale does not imply authority to mortgage, 594, 595

power to carry on mercantile business does not imply authority to endorse bills and notes, 561.

principal estopped by conduct from denying agent's authority, 597

revocation of, 597 *seq*

shipmaster, 570-573.

to raise specified amount on account of, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

PRINCIPAL AND AGENT—*continued*

authority of agent—*continued*.

to settle partnership affairs on dissolution does not authorise acceptance or indorsement of bills, 561.

when revocable, 592

co agents, employment of, 559

commission, forfeiture of, by misconduct, 609, 618

on secret dealings, agent cannot recover, 609.

commission, on wagering contracts, recovery of, 240, 241

"return," received from sub agent, 610

right of retainer for, 613.

when agent entitled to, 615, 616, 617

when due, 615

compensation of agent for injury caused by principal's negligence, 627

contract of agent, how enforceable, 628

damages, measure of, for breach of warranty, 653

deed, execution in agent's name, liability of principal on, 643

*del credere* agent defined, 658

delegation of authority by agent, 574 *seq*

duty of agent in conduct of business, 597 *seq*

in appointing another to act for principal, 579

not to deal on his own account in business of agency, 606

not to make secret profit, 608 *seq*

on death or insanity of principal, 596

standard of skill and diligence required, 602

to account to principal, 604

to communicate with principal, 606

to obtain principal's instructions, 606

to pay over money received on principal's account, 614

exclusive agency principal's right to act in agency where sole agent appointed, 661

foreign principal, agent's right to sue where contract with, 630

foreign state, suits against, on agent's contract, 643

fraud of agent, in course of business, binds principal, 659

guaranty of agent, loss arising from, 472

husband and wife, implied authority of wife, 661

implied warranty of agent's authority, 652

of agent's skill, 602

indemnity, agent's right of, against acts done in course of business, 623

against consequences of acts done in good faith, 625

against costs of defending action, 624

no indemnity against consequences of criminal or illegal act, 626

or of buying broker against consequences of his own wrong, 627

liability for acts of another appointed to act for principal, 579

loss occasioned by departure from instructions, 598

lien, agent's for commission and disbursements, 616, 619.

how lost, 621

not affected by bankruptcy of principal, 622, 623.

lawing of remedy by Statute of Limitations, 622

winding up of company whose agent he is, 622

PRINCIPAL AND AGENT—*continued.*

- lien sub-agent's, 620, 621.
- misrepresentation by agent, effect of, 630
- negligence, agent's liability for, 597-599
- negligence may prejudice agent's right to recover for disbursements, 618.
- negotiable instrument, liability of principal and personal liability of agent on, 644.
- notice to agent is notice to principal, 631 *seq.*
- personal liability of agent on contract, 634 *seq.*
  - on charterparty, what words exclude, 636-637.
  - on negotiable instruments, 644
- power of attorney, nature and construction of, 563.
  - revocation by death of principal, 588.
- principal defined, 557.
  - duty of, to agent, 623 *seq.*
  - estopped by holding out agent as having authority, 653-658.
  - how far bound by unauthorised act of agent, 629.
  - pakta adit* contracts, incidents of, 599, 601, 614
  - payment to agent, 565.
    - set-off not binding on principal unless authorised by him, 565.
  - right to all profits made in agency, 608
  - right to follow property in hands of third person, 665.
  - undisclosed, rights and liabilities of, 647 *seq.*
- profits, principal's right to limits of constructive agency for such purposes, 608.
- promise to pay barred debt. authority of agent, 205.
- public officer, cannot be sued for acts done on behalf of Government, 643
  - no implied warranty of authority in case of, 653
  - ratification of official acts of, 583
- ratification by principal of unauthorised or excessive acts of agent, 580 *seq.*
  - how made, 584
  - knowledge of facts necessary to validity of, 584.
  - of acts of state, 583.
  - of one unauthorised act ratifies whole transaction, 585
  - of unauthorised act, cannot affect third party, 586
  - principal cannot sue for breach committed prior to, 586
  - retrospective effect of, 582
  - secret dealings of agent, ratification of, only effective after full disclosure, 609, 610
  - void act cannot be ratified, 583
- remuneration, agent not entitled to, where business misconducted, 618
  - express contract in writing. no remuneration unless all conditions fulfilled, 617.
  - special modes of remuneration allowed by custom, 611
  - when due, 615
- retainer, agent's right of, 613
- revocation of agent's authority, 587.
  - by death or insanity of principal, 588, 597.
  - damages for premature revocation, 593, 594.
  - factor, whether authority of revocation, 591.

PRINCIPAL AND AGENT—*continued*

revocation of agent's authority—*continued*

may be express or implied, 595

notice of revocation 594

where two or more principals, joint authority to agent revocable  
by notice given by or to one only, 595

when effectual, 595

where authority coupled with interest, 589, 591.

where authority partly exercised, 592, 593

sub agent, authority of, revoked by termination of agent's authority, 597.

liability of, 576

liability of agent for acts of, 576, 577.

liability of agent for acts of, where appointed without authority, 577

liability of principal for acts of where duly appointed, 576.

where appointed without authority,  
577, 578

person appointed by agent with authority of principal is not,  
578.

when agent may delegate authority to, 574

when agent may not delegate authority to, 574

who is, 574

termination of agency, 587 *seq*

third party, equities between agent and, 648

undisclosed agent, contracts with, 646

undisclosed principal, rights of, 647 *seq*

wagering contract, agent bound to return to principal money received on account  
of, 241.

wife, implied authority of, to pledge husband's credit, 561-563

## PRINCIPAL AND SURETY,

assignment for benefit of creditors does not constitute relation of, as between  
debtor and trustee, 467

bill of exchange, indorser primarily liable as principal, 498

bond under C P C s 55 (4) discretion of Court to enforce bond, 491

co debtors suretyship between, 478, 479

co sureties entitled to share in benefit of indemnity, 508

contribution between co sureties, 507, 509

equal right of co sureties to benefit of securities, 508

no right of, between sureties by separate obligations for portions of same  
debt, 509

creditor defined, 467

rateable contribution where liability varies, 509

discharge of surety by variation of contract, 480 *seq*

bankruptcy, principal's discharge in, does not discharge sureties 487

by giving time to principal, 489.

acceptance of interest in advance by creditor amounts to giving time 490

contract for resale to vendor does not discharge surety, 481.

forbearance to sue in pursuance of agreement without consideration not  
a discharge, 490

PRINCIPAL AND SURETY—*continued*.

discharge of surety by variation of contract—*continued*.

operation of rule as to giving time may be excluded by express agreement, 491.

surety not discharged when agreement to give time made with third person, 491.

by *laches* of creditor, 488, 491, 495, 496

creditor's act or omission impairing surety's remedy, 491.

by operation of law, 487.

by release of one co surety, 493

by release of principal, 485

by variation of original agreement, 490.

consent decree made without surety's consent for payment by instalments, 490.

forbearance to sue principal debtor, surety not discharged by, 492.

joint debtors, suretyship between, 578, 579.

mere passive acquiescence in debtor's irregularities will not discharge surety, 495.

promise to give time distinguished from contract not to sue, 489, 490.

"settlement" contract for repurchase of goods from buyer, 491.

tendency to diminish surety's remedy or increase his liability chiefly considered, 495.

implied indemnity of surety, 505

interest, payment of, by debtor, whether keeping alive action against surety, 473.

surety's right to, on payment of debt, 498.

liability of surety, extent of, 469

how proved, 470.

where limited in amount, 470

where original contract void or voidable, 472

principal debtor defined, 467.

surety, death of, generally revokes continuing guarantee, 477

surety, defined, 467.

surety, rights of, on payment of liability on principal's default, 496

to benefit of securities, 498-501

suretyship between co-debtors, 478, 479

*And see GUARANTEE*

## PROFITS,

loss of, on breach of contract, 417

of agency, principal's right to, 608 *seq*

partnership, what are, 672 *seq*.

## PROMISE,

alternative, one branch unlawful, 340.

an accepted proposal, 13.

definition of, 13.

express, 62

gratuitous, 192

implied, 62

independent, 313

independent, to perform lawful and unlawful acts, 340

**PROMISE—continued**

- joint promises, 302, 303
- mutual, 29
- no intention to perform*, 116
- of forbearance, 30
- of marriage, breach of, does not survive against executors, 262
- performance of unlawful, 144, 145
- reciprocal, 13, 29, 30, 61, 191, 192, 340
  - performance of, 313 *seq*
    - order of performance, 317
- subscription to public or charitable object, 19
- tacit, 62
- to pay barred debt, 190, 202, 203
  - distinguished from acknowledgment, 203

**PROMISEE,**

- definition of, 13
- joint promises, all should sue on promise, 303
- rights of, in contract of indemnity, 465

**PROMISOR,**

- definition of, 13
- rights of, in contract of indemnity, 466

**PROMISSORY NOTE,**

- defined, 230, *n*
- for debt due on wager, void, 200
- for pre existing debt, does not bar original cause of action, 353
- given to partner by co partners in respect of advance to firm, 726
- given on attaining majority for debt incurred during minority, void, 74
- in favour of minor, validity of, 74
- signature by agent on principal's behalf*, 629

**PROOF,**

- burden of,
  - in contracts of lunatics, 80
  - in cases of loss of or damage to goods by carrier, 517.
  - in cases of undue influence, 103, 108
  - in dealings with *parda nishin* women, 88, 104, *seq*
- of foreign law, 141, 142

**PROPERTY, unlawful detention of, 92, 93****PROPOSAL,**

- acceptance of 13 14, 30 33
  - by performance of conditions, 55
  - by post, 36, 37
  - by receipt of consideration, 55
  - must be by person to whom offer is made, 84
  - must be certain, 49
- communication of 33 *seq*
  - when complete 36
- meaning of 13 14

**PROPOSAL—continued**

rejection of, 48.

revocation of, when effectual, 38-42

**PROPOSER, death or insanity of, 48****PROSPECTUS, of company, incorporation in life policy, 35.****PUBLIC DUTIES,**

application to enforce

alternative order on, 866.

how made, 866.

procedure on, 866.

conditions to be satisfied before order to enforce, can be made, 862.

distinguished from personal rights, 864.

enforced by "requiring a specific act to be done or forborne," 862.

enforcement of, 859-866.

inferior Courts of judicature have no power to enforce, 864.

jurisdiction of Courts to enforce, under section 45 of S R A cannot be invoked where other specific and adequate legal remedy, 865.

of a corporation, how enforced, 863-866.

order directing enforcement of, bar to issue of *mandamus*, 867.

execution of and appeal from, 866.

may be peremptory, 866.

parties against whom no order under section 45 of S R A to enforce, can be made, 863.

scope of order under section 45 of S R A to enforce, 861.

what Courts empowered to enforce, 859, 862.

what persons can be directed to carry out 863.

**PUBLIC OFFICER,**

cannot be sued for acts done on behalf of Government, 643

contract with, conflicting with public duties, void, 184

employment on work outside duties of office not within section 45 of S R A, 863.

no implied warranty of authority in case of, 653

ratification of official acts of 583

statutory duties order to enforce cannot be made where Provincial Governor specially authorised by Legislature, 865

**PUBLIC OFFICES, sale of, unlawful 184****PUBLIC POLICY,**

agreements contrary to, 148 149 165, 167 *seq*, 213

agreement to supply funds to carry on suit in consideration of share of property recovered not opposed to 173

champerty and maintenance 173 *seq*

marriage, agreement to pay money in consideration of, is against, 150 *seq*

promise by married man to marry woman after his wife's death contrary to, 163

monopoly, agreement tending to create opposed to, 185

public offices, sale of, contrary to, 184

restraint of trade, agreements in, 209

public interest the true test of validity of agreements, 213, 214, 219.

**PUBLIC POLICY**—*continued*.

stifling prosecution, 169.

trade combinations, agreements for not against, 216

trading with enemy, 167.

what term covers, 167.

**PUBLIC SERVANTS**, *ratification of acts of*, 583.**PURCHASE**, at undervalue, 101, 192, 207

with notice of prior agreement for sale, 816.

**PURCHASER**,

acquiring outstanding title, 777.

rights of, against vendor to have his expectations satisfied, 778.

against vendor with imperfect title, 776.

**PURCHASERS**, some of several, of immovable property cannot claim specific performance, 775.**QUASI CONTRACT**,

liability of promisor in void agreement, 398, *n*

reimbursement of money paid under, 378, 379.

**RAILWAY COMPANY**. *See* CARRIER.**RATIFICATION**,

conditions necessary to, 584, 585.

knowledge of facts necessary to validity of, 584

of acts of state, 583

of agent's contract, 580 *seq*

how made, 584

of minor's contract, 74

of one unauthorised act ratifies whole transaction, 669

of secret dealings of agent, only effective after full disclosure, 609, 610

of unauthorised act, cannot affect third party, 586

retrospective effect of, 582

void act cannot be ratified, 27, 74, 583

**RECEIVER**,

appointment of, discretionary, 859.

mode and effect of, 859.

not answerable to third person for unauthorised acts of agents, 579.

of partnership, appointment of, 726

**RECIPROCAL PROMISES**. *See* PROMISE**RECTIFICATION OF INSTRUMENTS**,

counter-claim for, may be allowed, 828.

may be followed by decree for specific performance, 829.

"mutual mistake, a ground for, 827.

none where no prior actual contract by which to rectify, 139, 824.

presumption as to intent of parties for the purpose of, 829.

principles on which English Courts adjudge, 824, 902.

to establish a right to, it is necessary to show fraud or common mistake, 827.

when allowed 826.

will not be allowed where rights acquired by third persons in good faith would be affected 829

REFUSAL TO PERFORM CONTRACT *See* PERFORMANCE

## REGISTRATION,

- of agreement made on account of natural love and affection, 190, 193
- of documents, 65

## REGULATIONS, unrevoked, 9

## RELEASE,

- by one of two joint mortgagees discharges mortgagor, 277, 303
- of one joint promisor, 302

## RENT,

- distress for, goods in hands of auctioneer or factor privileged from, 664
- receipt for cashing of cheque for less than amount due, 364, *n*
- tender of, 276, 277.

## REPRESENTATION,

- means of discovering truth of, 129
- of authority by directors, 121, 122, 124
- reliance on, 131, 132.

## REPRESENTATIVE IN INTEREST, how far liable to a decree for specific performance, 802.

## RESCISSION,

- agreement to rescind, effect of, 347
- alternative prayer for, in suit for specific performance, 833.
- "anticipatory breach," giving promisee right to rescind, 284, 285
- "any person interested in a contract," at the instance of, 832.
- conditional on party rescinding doing equity, 833.
- fraud, rescission of partnership agreement for, 712.
- inadequacy of consideration not of itself sufficient ground for, 207
- misrepresentation of title, purchase rescinded for, even after conveyance and possession, 831, *n*
- mistake, for, 833.
- must be express and unequivocal, 367
- of unlawful contract, 186
- of voidable contract, 132, 133, 365 *seq.*, 831, 832.
  - how communicated, 384
- option to rescind in certain events does not make contract contingent, 250
- party cannot both rescind contract and retain advantage acquired under it, 365, 367
- party rightfully rescinding entitled to compensation, 460
- principles governing 830.
- right to rescind on failure of other party to perform contract in its entirety, 280 *seq.*
- when may be adjudged, 831.
- when parties *in pari delicto*, 832, 833.

## RESTRAINT OF LEGAL PROCEEDINGS

- agreements restricting right to take legal proceedings void, 220
- exception of agreements to refer to arbitration, 220, 221
- undertaking not to appeal, given for consideration, is valid, 223, 227

RESTRAINT OF MARRIAGE *See* MARRIAGE

## RESTRAINT OF TRADE,

- agreement in void, 209
- agreement by employee not to compete with employer, valid, 212, 213
- agreement cannot be enforced if without consideration, 212.
- agreements made abroad not enforceable though valid by *lex loci*, 219.
- exception where goodwill sold, 210
  - in cases of arrangement between partners and agreements on dissolution, 210
- injunction, enforcement of negative stipulation in restrictive agreement by, 213
- limits of time and space, 210, 211.
- limits of restraint must be reasonable, 210, 214
- ordinary trade contracts not aimed at, 216
- public interest the true test in determining question of reasonableness, 213, 214  
219
- restrictive agreements between manufacturers to pool profits, whether within section, 216
- restrictive agreement during term of service not illegal, 212
- trade combinations to keep up price of goods not within section, 215-219

## RETAINER, agent's right of, 613

## REVOCATION,

- arrival of, before acceptance, 40
- by lapse of time for acceptance, 47.
- by withdrawal of bid at sale by auction, 42
- not presumed, 46
- of acceptance, 40 *seq*
- of agent's authority, 587 *seq*.
- of proposal, 33
  - when effectual, 39, 41 *seq*
- of proposal, notice of, 44

## REWARD,

- offer of, 56
- right of finder to sue for, 535

## ROMAN LAW,

- as to liability of bailor for defects in goods bailed, 514, 515
- expenses of gratuitous bailor, 529.
- mixture of goods bailed with those of bailor, 528.

## SALE,

- at undervalue, 101, 102, 207
- by auction, 42
- of goods pledged, 516, 517
- of immovable property, may be specifically enforced, 758, 761.
  - will not be specifically enforced where vendor has no title, 805.
- of land, to defraud execution creditor, 162, 163
  - French of contract, 426-429
  - by mortgagee "subject to all defects," 177.
- of movable goods, how far specifically enforced, 762.

SALE—*continued.*

- \* of public offices, 184
- of share in partnership business, may be specifically enforced, 763
- of stocks or shares not a proper subject for specific performance, 763

## SALE OF GOODS,

- auctioneer does not contract with intending bidders that goods will be offered for sale, 57.
- if contract commission agent, tender of bill of lading after contract dissolved by war, 709
- damages, measure of, on breach of contract, 405
  - for non acceptance of goods by buyer, 410 411, 412
  - non delivery of goods by seller, 406, 409, 422
- delivery, time when of essence of contract, 324, 325
  - must be at place fixed by buyer where not specified in contract, 310
  - on Sunday, 309
  - where time specified, 311
- duty to disclose defects, trade usage as to 118
- inspection of goods what is a reasonable opportunity, 274, 275
- instalments, measure of damages for failure to deliver on due dates, 411,
- non existing goods, sale of, 134, 135
- payment, stipulation as to time of, not generally of essence of contract, 322, 324
- price reasonable price presumed where none named, 229
  - tender of, by buyer, not necessary as evidence of willingness to perform 316
- readiness and willingness to perform contract 315, 316
  - demand for delivery without payment or tender is not evidence of, 316
  - goods need not be in vendor's actual possession, 316
- standing offers, 43
  - subject to all defects, 137
- tender of goods, 269
- warranty, breach of, buyer's rights on 136, 137
  - damages for, 415

## SALE OF GOODS ACT, 1893 422

SALE OF GOODS ACT (III of 1930) 422, 432, 513, 548 *seq*

## SEAL, requirement of, 375-378

- dispensed with where consideration executed, 377

SECURITIES, surety's right to benefit of, 498 *seq*SEPARATE ESTATE *See* MARRIED WOMAN.SERVANT *See* MASTER AND SERVANT

## SETTLEMENT, testamentary directions to execute, may be specifically enforced 822, 823

## SETTLEMENT CONTRACT, effect of, 352

SEXUAL IMMORALITY, contracts tending to, 164 *seq*

## SHARES, application for, induced by false representation as to identity of company, 90

**SHIP,**

authority of shipmaster, 570-573.

misrepresentation as to tonnage: avoidance of charterparty 124.

part owners of, not necessarily partners, 671.

but where ship employed on joint account they are partners as to the joint adventure, 671.

**SKILL**, standard of, required from agent, 602.

**SOLICITOR,**

gift from client to, 100.

implied authority to compromise suit, 563.

lien of, on client's papers, 537, 541.

discharging himself loses lien, 542.

dissolution of firm of solicitors extinguishes lien, 542.

taking security from client, whether waiver of general lien, 541, 542.

to what documents lien extends, 542.

**SPECIAL CONDITIONS,**

communication of, 34

indorsement of, on tickets, 34, 35.

**SPECIFIC PERFORMANCE,**

agreement to refer, 228

alternative claim to specific performance or damages. election open until hearing, 784.

alternative promise, partly unlawful, lawful branch enforceable, 340

building contract, specific performance of not convenient, 764.

by and against company, 801, 802, 814.

by co parceners in joint Hindu family, 815.

personal representatives, 261

personal contracts not enforceable against, 261.

reversioner, 801.

certainly necessary for, 229.

compensation, award of, 782, 783.

compensation for misdescription, 128-129.

consideration, inadequate, no bar to, 208, 822.

contract for sale of land, 53, 758.

contracts, 757, 758 *seq*

against whom enforceable, 813.

against whom not enforceable, 819,

for transfer of immovable property by way of security granted where damages not adequate, 762.

grounds of defence in a suit for, 804,

not specifically enforceable. 785, 797.

with compensation where part unperformed is small, 766.

where part unperformed is large, 769

damages, liquidation of, no bar to, 784.

decree not granted because contract contains provision for special payment by vendor on breach, 830.

discretion as to granting decree, 793.

**SPECIFIC PERFORMANCE**—*continued*

dismissal of suit, effect of, 822.

execution of decree, 764

independent part of contract, of, 773

“separate and independent footing” necessary, 775.

independent promises to do lawful and unlawful acts, lawful ones enforceable, 340.

infant's contract, cannot be specifically enforced, 76

lease, part performance of contract to, 817, 819.

lost deed, suit to obtain benefit of, 765

mistake, right to resist suit on ground of, 139

not granted in favour of party who has become incapable of performing essential term of contract, 285

part performance, contract to lease, 817, 819.

immovable property, contract to transfer 818.

inability to perform small part of contract only, 766.

where unperformed part is large 769

independent part of contract of 773

to be ordered only in specified cases 776

purchaser undisclosed principal no answer to action for, 762

representatives, enforceable against, 813, n

stock, Government contract for sale of not proper subject for, 763

subject matter of contract, portion of not in existence 765

title, absence of in seller, 805

subsequent relief against persons claiming under, 813

undisclosed intention of one party to perform unlawfully, 147.

unregistered agreement, of, 819.

when enforceable, 760

with variation 811.

**SPECIFIC RELIEF.**

by way of preventive relief, 745

cannot be granted to enforce penal law, 746

how given 745

immovable property recovery of possession 748

movable property, recovery of, 755.

person in possession not as owner delivery to person entitled to immediate possession, 756

recovery of possession under section 9 of S. R. A., suit for: question of title cannot be raised 759

settlements, awards and directions to execute, 822, 823.

**SPECIFIC RELIEF ACT (I of 1877) 745-823.****SPECULATIVE TRANSACTIONS 244**

*See* WAGER

**SPIRITUAL ADVISER gift to, 99, 100****STAKE HOLDER, rights and liabilities of, 241-244 250****STATUTE, acts fortified by, 149 seq.****STATUTE BARRED DEBT.**

appropriation of payments to, 246

promise to pay, when enforceable, 100

"STIFLING PROSECUTION," agreements for, against public policy, 169-173  
 withdrawa of prosecution already begun is not, 172, *n*

## STOCK,

contract for purchase of, when void as wagering contract, 244-246

Government, contract for sale of specific performance not proper remedy for breach, 763

STRANGERS TO CONTRACT, rights and liabilities of, 19-25

STRIDHANAM *See* MARRIED WOMAN

STRIKE, stoppage of work by, effect on contract, 330

SUB AGENT. *See* PRINCIPAL AND AGENT.

SUBSEQUENT TITLE, relief against parties and persons claiming under them by, 813.

SUCCESSION ACT, 1925, 79, 742.

SUIT FOR SPECIFIC PERFORMANCE, effect of dismissing, 822

SUNDAY, delivery of goods on, 309

SURETY. *See* PRINCIPAL AND SURETY.

SURVIVORSHIP, to Government securities, 307

TACIT PROMISE *See* PROMISE

TEJ MANDI TRANSACTION,

whether void as wager, 239

TELEGRAM, revocation of proposal by, 37

## TENDEP,

acceptance, effect of, 44

before due date, 273, 274

by mortgagee, 277, *n*

conditions prescribed by public bodies under statutory powers, 42

contract by acceptance of, 44

legal 276

must be of entire amount, 269, 270

and unconditional, 271.

of cheque, 269, 276

of currency notes, 276

of goods reasonable opportunity of inspection, 274-276

of instalments, 273, 274

of money, 276

of price, not necessary to show willingness to perform contract for purchase of shares, 315.

of rent, 276 277

refusal by creditor to accept payment precludes subsequent objection to form 276

to one of several joint lessors or mortgagees valid, 277-279

unascertained sum, offer of, is not a, 269

TERMS, of contract, implied, 62, 63

## THIRD PARTY,

agent, ratification of unauthorized act of, cannot affect, 586

cannot sue on contract by English law, 19 21

claiming goods bailed, rights of, 534

cons location may proceed from, under Act, 19

**THIRD PARTY**—*continued*.

- contract with agent, when principal bound by, 563, 629, 630
- equities between agent and, 648
- principal's right to follow property into hands of, 665
- without title, cannot challenge validity of contract, 132

**TICKETS**, indorsement of special conditions on, 31**TIME**,

- for performance of contracts, 309
  - extension of, 361
- of payment, not generally of essence of contract in sales of goods, 321
- when of essence of contract, 323

**TIME TABLE**, general proposal by, 56, 57.**TITLE**,

- acceptance of, on sales of land, 53, 54
- bad, varieties of, 802, 803.
- defective, agreement that vendor not liable for—effect of concealment on, 117, n
- disputed, compromise on, not affected by later decision on title, 136, n
- doubtful, will not be forced on an unwilling purchaser, 807, *seq*
- such as the vendor has, 810

**TORTS** *See* **WRONGS****TRADE**,

- agreements in restraint of *See* **RESTRAINT OF TRADE**
- combinations, agreements for, not against public policy, 216
- usage of, 9 *seq*, 63
  - as to disclosure of defects in goods sold 118
  - Bombay, as to purchase and sale of goods by agent 599

**TRADE MARK**,

- is "property" for purposes of section 54 of S R A, 872.
- may be protected by grant of injunction, 879, 880.

**TRADE NAME**, use of, 132, 675**TRADING WITH ENEMY**, unlawful, 167–169**TRANSFER**,

- of immovable property, 197
  - intent to defeat creditors, 163

**TRANSFER OF PROPERTY ACT** (IV of 1882), 186, 689, 739, 743, 766, 769, n, 778, 779, 780, 816, 835.**TRESPASS**, continuing, may be prevented by grant of injunction 877.**TRUST**, breach of, may be prevented by grant of injunction, 879.**TRUSTEE**,

- gift to, by *cestui que trust*, 100
- is a "person interested to deny" under section 42 of S R A, 840.
- not entitled, unless expressly authorised, to make novation of contract, 348.

**TRUSTS ACT** (II of 1882), 186, 372, 693, 722, n, 743, 744.**UNCERTAINTY**, agreements void for, 228, 229**UNCONSCIONABLE BARGAIN**,

- burden of proof, 108 *seq*

UNCONSCIONABLE BARGAIN—*continued*.

excessive rate of interest, 109-112.

inadequate consideration, 108

presumption in cases of, 108.

## UNDERVALUE,

mortgagee's covenant to sell at, 109.

purchase at, 101, 102, 207.

reversionary interest, sale at, 109.

"unconscionable bargains," 108.

## UNDUE INFLUENCE,

burden of proof, 96, 97, 98, *n*, 103, 108.

"catching bargains" with expectant heirs and others, 107, 109  
defined, 95

delay and acquiescence as bar to relief, 100, 113, 114

equitable doctrine of, 97.

fear as factor in, 102

fiduciary relations, 96, 98-100

independent advice, 101, 102

master and servant, relation of, 95, *n*

mental distress, 102

*parda nishin* women, contract with burden of proof, 88, 101 *seq*.

parent and child, transactions between 100-101.

setting aside contract induced by, 132, 133

solicitor, gift to, 100

spiritual adviser, gift to, 99, 100.

threat of criminal prosecution is not, 102.

but deed executed by ignorant person under threat, and in absence of independent advice, set aside, 103

trustee, gift to, 100

unconscionable bargains, 96, 108

"*unfair advantage*," 95, 98

UNILATERAL CONTRACT. *See* CONTRACT

## UNLAWFUL AGREEMENTS,

agent must account to principal for money received under unlawful contract, 614, 615.

champerty, agreements infringing rule against, 173 *seq*

consideration unlawful in part, 186

lotteries, 251.

marriage brokerage contracts 180 *seq*

money paid under, recovery of, 164, 165, 368, 369, 370

monopoly, agreement tending to create, 185

morals, agreements contrary to, 111, 118, 164 *seq*

mutual promises to perform legal and illegal acts, 340

object, when unlawful, 141 *seq*.

pleadings in cases of, 185, 186.

promise by married man to marry another woman on his wife's death, void, 165

public officers, sale of, 184

public policy, agreement contrary to 148, 149, 165, 167 *seq*, 213



## WARRANTY,

- breach of, buyer's right on, 136, 137
  - measure of damages on, 415
- implied, of authority by agent, 652.

WHARFINGER, lien of, for balance of account, 537, 541

WINDING UP, by Court & dissolution of partnership, 724

WITNESS, promise, after subpoena, to pay, for loss of time, without consideration and void, 195

## WORDS,

- acknowledgment, 203
- agent, 557
- agreement, 13, **745**.
- another person, 398
- appeal, **755**.
- bailee, 510
- bailment, 510
- bailor, 510
- benefit, 368
- business, 614
- by way of nager, 233.
- causing consent, 125, 126, 131
- champerty, 173
- coercion, 92, 403
- consent, 81
- consideration, 13, 145
- constructive trust, **743**.
- contingent contract, 252
- continuing guarantee, 47
- contract, 13, 224, **745**.
- contract of guarantee, 467
- contract of indemnity, 462
- creditor, 467.
- debt, 205
- del credere* 558
- deposit, **780**.
- dispossessed, **751**.
- documents of title to goods, 548, 551
- does, 398.
- dormant partner, 723
- engagement, 307
- express trust, **743**.
- firm, 675
- forbitten by law, 114, 119
- fraud, 114.
- fraudulent, 162
- free consent, 91
- further relief, **852 854**
- future transactions 175

WORDS—*continued*

good consideration, 31  
 goodwill, 701  
 gross profits, 672  
 immoral, 161  
 implied trust, **743.**  
 indemnity, 462  
 interested to deny, **852**  
 keeping silence, 504  
 lawfully, 397  
 liability, 468  
 Lord s Day Act, 309  
 mandamus, writ of, **860, 861.**  
 material circumstances, 504  
 mercantile agent, 548  
 misrepresentation, 118  
 near relation, 190, 198  
 net profits, 672  
 notice, 551  
 object, 145  
 obligation, **741, 742.**  
 ordinary diligence, 130  
 partnership, 668 \*  
 pawnee, 543  
 pawnor, 543  
 person, 366  
 pledge, 543.  
 positive assertion, 118, 121  
 possession, 550  
 principal, 507  
 principal debtor, 467  
 profits, 672  
 promise, 13, 14, 203  
 promisee, 13  
 promisor, 13  
 proper time and place 309  
 "property," **876.**  
 proposal, 13, 14  
 reasonable compensation 455  
 reasonable opportunity, 274  
 reasonable time, 307.  
 reciprocal promises 13, 29.  
 reversionary heir, **857.**  
 settlement, **742.**  
 sub agent, 575  
 suit, 755.  
 surety, 467  
 thing 82  
 trust, **741, 743.**

WORDS—*continued*trustee, **741, 743.**

undue influence, 95 97

unfair advantage, 95, 98

void agreement, 13

voidable contract, 13

WORK AND LABOUR no remuneration for, unless work completed 370

WRITTEN CONTRACTS, unauthorised alteration of, 353 *seq*

## WRONGS

injury to goods bailed, right to sue for, 556

liability by holding out does not apply to, 686

to third party, liability of firm for, 690, 691

ZANZIBAR, *Specific Relief Act does not apply to*, 213, *n*

